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200 Years of U.S. CONSTITUTIONALISM

An Analysis of Basic Premises



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INTRODUCTION

The concept of constitutionalism, forming the foundation of Western capitalist democracies, emerged and developed at the close of the 18th century which saw a rapid procession of bourgeois revolutions. Springing out of ideas of natural law, constitutionalism was the bourgeois-democratic answer to feudal-monarchical tyranny and, like the bourgeois democracies that replaced absolutist regimes, bore a progressive beginning.

Basically constitutionalism can be defined as the presence in a country of a constitution, whether written or unwritten, and its treatment as the supreme, fundamental law of the state, regulating that state's structure and activities and its interaction with citizens. A theoretically important element of constitutionalism is a strict adherence to the constitution, absolute compliance with its instructions. Yet constitutionalism comprises more than the simple presence of a constitution. First, constitutionalism as the expression of a political ideology whose initial aim was to limit the powers of a monarchy by means of a constitution arose long before the adoption of written constitutions. Second, the very presence of a constitution does not in itself give rise to constitutionalism, which is to be understood primarily as the juridical embodiment of democracy. Today in Chile there is a Constitution, but hardly anybody of sound mind would assert that in this country, where a junta rules by military-fascist methods, there exists constitutionalism. William Andrews, the author of *Constitutions and Constitutionalism*, writes in this regard, "Many regimes in the world today have constitutions without constitutionalism. Tyrants, whether individual or collective, find that constitutions are convenient screens behind which they can dissimulate their despotism."[1] Constitutionalism, nonetheless, cannot exist without a constitution, just as parliamentarianism cannot exist without a parliament.

American bourgeois constitutionalism has much in common with analogous political systems adhered to by other advanced capitalist states, yet it also possesses its own specific traits which set it apart from constitutionalism as practised in Brit-

[1] *National Forum*, Fall 1984, No. 4, p. 4.

ain, France, Italy and other Western states. Americans themselves, whether scholars, jurists, political scientists or politicians, with a pragmatism typical of this nation, avoid a clear definition of the concept of constitutionalism, preferring instead to list its characteristic features. The list of these features changes depending on who it is that is dealing with the definition of constitutionalism.

Some restrict themselves to citing the American Constitution of 1787 and the legal principles set down in it such as the legislative powers of Congress, the reserved powers of the states, impeachment, due process of law, equal protection of the laws, etc. Others, like a traveling salesman, will offer you an entire suitcase full of mongrelized traits of constitutionalism, inviting you to pick whichever you like.

To be sure, it is difficult to pin down exactly what American constitutionalism is. Among the constitutional values that have come into being over the two centuries of the existence of the United States is a diverse assortment of principles, slogans, ideas, maxims, exhortations and precepts. Some of them, such as the motto "In God We Trust" which appears on all American currency, perform ritual functions, while others, such as the constitutional principle of "due process of law," have etched out an existence for themselves.

Some of the maxims included on the list of traits of American constitutionalism were coined by people held in high esteem in the United States. Such was the dictum "A government of the people, for the people and by the people," given to the country by Abraham Lincoln. Other verbal embodiments of constitutionalism that have firmly entered the political and legal lexicon have neither a formal constitutional basis nor a clear origin. For example, the formula "Equal justice under law," so widely extolled by American jurists, was in all probability invented by the architect who drew up the plans for the U.S. Supreme Court building, where the inscription was etched into the stone front of the structure. A no less widespread phrase which is linked with constitutionalism, "Liberty and justice for all," is taken from the pledge of allegiance to the flag, a pledge that is repeated daily in most of the nation's schools. For a long time the authorship of the pledge, which first appeared in 1892 on the pages of *The Youth's Companion*, a magazine published in Boston, was contended by two of the magazine's editors. Today credit is generally given to Francis Bellamy, one of the two editors.

We could go on endlessly listing verbalized ideas, ideals, postulates and principles of American bourgeois constitutionalism that lack a clear content or a traceable origin. We should note that even those which are set in the Constitution

in seemingly clear formulas are in reality not very distinct in their meaning. The U.S. Constitution, for example, guarantees every state a "republican form of government" (Section 4, Article IV). The principle of republicanism is one of the most basic attributes of constitutionalism. However John Adams, the 2nd U.S. President, gloomily remarked, "The word *republic* as it is used, may signify anything, everything, or nothing."[1]

Another feature of American constitutionalism is that a number of its sacrosanct, institutionalized principles are not formulated in the Constitution itself but are regarded as flowing out of its spirit. Among these are such precepts as separation of powers, federalism and constitutional judicial review.

Without attempting to list the entire file of attributes of American constitutionalism, from which American propagandists and official ideologists can quickly pull a convenient example for proving any point, we shall single out only the key ones, considered as such by American jurisprudence. Making up the core of constitutionalism are the ideas of "popular sovereignty" and a social contract as the source of the government; the principles of republicanism, federalism, separation of powers and government limited by law; respect for the rights and liberties of citizens and the protection of private property; the rule of law and the supremacy of the Constitution; independence of the judicial branch and judicial review. It should be stressed that the entire set of ideas and principles of constitutionalism is interwoven in a fabric of private-ownership individualism, the opposing of the individual to society and the government, mistrust of authority, ethnocentrism and a belief that the American people have a special mission.

The principles of American constitutionalism existed in embryonic form long before they were set down for posterity in the late 1780s. The period of their evolution began with the founding of the first British colonies on the Atlantic seaboard of North America in the early 17th century and ended when the Federal Constitution of 1787 came into force. The first colonists in America were British Protestants who were forced to flee their homeland because of brutal religious persecution. They brought with them not only clothing, tools, a language, customs and habits but also political and legal traditions. It is therefore not surprising that their political and legal notions as well as their governmental and legal insti-

[1] J.W. Peltason, *Corwin and Peltason's Understanding the Constitution*, Dryden Press, Hinsdale, Ill., 1973, p. 96.

tutions developed under English influence. This influence could be detected not only in the works of contemporary clerical and secular ideologists but in the charters which the settlers received from the British crown. Already in the first charter issued in 1606 by King James to the colony of Virginia can be detected the roots of a representative form of government and the legal status of the colonists. The charter ordained that "each of the said Colonies shall have a Council which shall govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of England." The charter also declared that all colonists and their descendants "shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our realm of England, or any other of our said Dominions."[1]

The provisions of the Virginia Charter and of subsequent documents concerning the self-government of the colonies under the aegis of the British crown meant that the colonists were subject to the same laws and liberties as were all British subjects. It should not be forgotten that the unwritten British Constitution, whose foundation was laid by the Magna Carta of 1215, established a political system that embodied certain elements of democracy.

Playing an important role in the formation of American constitutionalism were ideological dissensions among the colonists, which in the first few decades of the 17th century had already expressed themselves in the various forms of colonial government and in relations between the small ruling class and the large mass of subjects.

The establishment of a theocratic oligarchy in Massachusetts, where lay authorities joined with the clergy to impose uniformity of beliefs, was an extreme example of reactionary, authoritarian tendencies which spread through politics and political thought, especially religious. Magistrates and the clergy which formed the ruling elite of this colony set up an openly hierarchical regime that rejected any kind of equality and suppressed all manifestations of free thinking. Dissenters were harshly persecuted and banished from the colony. An overtly repressive policy resulted in the establishment by deviants expelled from Massachusetts of new colonies committed to more democratic principles. The more well-known of these dissenter colonies was Rhode Island, founded

[1] *Documents of American History*, ed. Henry Steele Commager, Appleton-Century-Crofts, Inc., N. Y., 1949, pp. 9, 10.

by one of the leading progressive philosophers and religious thinkers of the English-speaking world of the 17th century, Roger Williams. Rhode Island was granted a charter as a self-governing colony in 1663 by King Charles II. This "little republic," as it was known, was committed to such principles as a representative form of government, freedom in religious affairs and equality of all subjects, which Williams believed should apply not only to the white colonists but to Indians and blacks as well. Seeking to safeguard the colony from tyranny and oligarchy, Williams saw to it that the acts of government approved by the colonists provided for the frequent holding of elections, the creation of a unicameral legislature, the granting to citizens of legislative initiative, the holding of referendums and other democratic institutions.

Most American historians agree that by the beginning of the 18th century a system of British colonial rule was basically in place and more or less stable. The 13 colonies then in existence could be divided into three groups based on their legal status. The colonies of Rhode Island and Connecticut, whose charters provided for self-government, were in a special position. These two colonies are generally referred to as republics of sorts, since their governing bodies were elective. Nevertheless, they were a long way from being totally sovereign states since both of these "republics" were a part of the British Empire. Pennsylvania, Delaware and Maryland were private landholdings, and the remaining 8 colonies—Massachusetts, New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina and Georgia—were de facto and de jure possessions of the British crown.

By the time of the American Revolution, lasting from 1773 to 1783, the colonies already possessed a great deal of political experience and had formulated (though not without considerable influence from England and, later, France) their own political values. Widespread among the colonists was the belief in the necessity of a clean break from the British crown and the creation of their own statehood. At the same time, such elements of the American model of constitutionalism were born as separation of powers, election of officials, respect for the rights and liberties of citizens, religious tolerance, formal equality, freedom of private enterprise, the natural rights of man, and individualism.

American constitutional and political thinking did not emerge out of a vacuum. Having considerable influence on its formation was the British constitutional system, and to no less degree English writers and scholars the likes of John Milton, Edward Coke, John Locke and Thomas Hobbes. While American political thinking during the period up to the revo-

lution borrowed more sparingly from French thinkers of the time, who included Voltaire, Jean-Jacques Rousseau and Charles Montesquieu, their influence on it was considerable in the period between the revolution and the enactment of the Federal Constitution.

Yet it was American men of letters that played the key role in the formation of the precepts of American constitutionalism. Among the most prominent ones were John Adams, James Otis, Jonathan Mayhew, John Dickinson, Benjamin Franklin, Thomas Jefferson, Alexander Hamilton, James Madison and John Jay. Occupying a special place among them is Thomas Paine, who is famous for his devastating critique of the foundations of British constitutionalism—restricted, parliamentarian monarchy. Paine's passionate and well reasoned writings not only burst American illusions about the British constitution but to a considerable extent helped to precipitate the acceptance by Americans of the idea of republicanism as one of the precepts of American constitutionalism.

The formation of American constitutionalism owed much to the American Revolution, whose origins were peculiarly American and distinguished it from the English Revolution of the 17th century and the Great French Revolution which broke out two years after the adoption of the U.S. Constitution.

The first thing peculiar about the American Revolution was that in the British colonies on the Atlantic seaboard of North America feudalism, as a socio-economic formation, never took root. Attempts by British authorities to artificially implant feudal institutions in the American colonies did not meet with success. Unlike in Europe, in the New World capitalism sprang up from a soil virtually untouched by the vestiges of feudalism.

The second feature that distinguishes the American Revolution from other revolutions of the era was that its chief objective was to throw off the British colonial yoke. The British and the French revolutions, on the other hand, had solely social goals. Although these were on the agenda in the American Revolution too, its main thrust was aimed at achieving independence.

During the course of the American Revolution there appeared documents that were to play an important role in the development of American constitutionalism. One such document is the Virginia Bill of Rights, signed into law June 12, 1776.

The Virginia Bill is considerably less well known than the Declaration of Independence adopted three weeks later. But it was the first to state plainly and without reservation that

all men were by nature equally free and independent and that they possessed certain inherent rights, including the enjoyment of life and liberty, the right to acquire and possess property, and to pursue and obtain "happiness and safety." It proclaimed that the people were invested with ultimate authority, that all power belonged to the people and originated with the people. The Virginia Bill formulated what was one of the most revolutionary demands of the time—the people's right to reform, alter or abolish the government should it be found to act contrary to the interests of the people. The Bill's authors stipulated that "the legislative and executive powers of the state should be separate and distinct from the judiciary."[1]

The Virginia Bill invested all resident males with the right to vote, provided for, in the British manner, guarantees of a fair trial and rights of the defendant, and guaranteed freedom of religion which, in those days, was of great significance, since in several colonies an official religion had been established and dissenters were punished.

Although the Virginia Bill was in many ways a "British document," the influence of natural law, a progressive doctrine at the time, on the minds of its authors was more than apparent. The Virginia Bill had considerable impact on other key documents of the independent states, with its influence particularly visible in the Declaration of Independence, the Federal Constitution and the Bill of Rights.

The Declaration of Independence, proclaimed on July 4, 1776, in addition to the major importance it had for the war of independence, played a leading role in the development of American constitutionalism. It provided a powerful stimulus to the institutionalization of civil rights and freedoms which had been started by the Virginia Bill of Rights.

The chief importance of the Declaration of Independence, written by Thomas Jefferson and approved by the Continental Congress after several changes were made in it, lay in its declaration of the former British colonies as independent sovereign states. This event was of extreme significance not only to Americans themselves but to the rest of the world. However, of no less importance were the clauses of the Declaration dealing with people, society and the government.

In the second section of the Declaration it is stated, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness." It merits mention, however, that equality as it was understood then was not meant to extend to all subjects, but merely to white male property-owners.

[1] *Documents of American History*, pp. 103-04.

It excluded slaves, Indians, women and the unpropertied. It would take many years of bitter class warfare before the principle of equality acquired a legal basis. But even in contemporary America there still exist vestiges of sexual inequality, to say nothing of discrimination against black Americans and members of other ethnic minorities.

Most striking is that the list of inalienable rights contained in the Declaration of Independence is considerably shorter than those rights invested by the Virginia Bill of Rights. At the same time, the Declaration makes no mention of the right to own and dispose of private property. The substitution in the text of the right to private property with the right to "pursuit of happiness," in itself a progressive precept, by no means signified that this "natural" right had been abolished, something unthinkable in bourgeois America. Yet this was to have considerable constitutional ramifications. Neither in the Federal Constitution of 1787 nor in the Bill of Rights adopted in 1791 was *direct* provision made for the ownership of property, though various provisions were contained in them of legal guarantees of the inviolability of property.

A key principle of the Declaration was the right of the people to abolish a tyrannical government. The proclamation of this right was met by the reactionaries of the time with fury. Contemporary conservative American historians remark with open displeasure that the Declaration of Independence set forth a "justification of revolution that is a most uncomfortable doctrine to a generation that wants no upheaval."[1] American reactionaries, however, find comfort in the fact that, first, the Declaration of Independence has never been a document having legal force, and, second, that there is no mention in the Federal Constitution of the people's right to abolish a tyrannical regime, while under current American law such appeals are regarded as a serious criminal offence.

The U.S. Constitution, consisting of seven original articles and 26 amendments added over the 200 years since its adoption, makes up the legal foundation of the variable ideas of American constitutionalism.

The U.S. Constitution, adopted in 1787, was the first written constitution in the history of mankind. It was adopted at a time when almost the entire world was ruled by monarchs. The roots of bourgeois democracy had existed only in a few European states. Appearing in the world nearly two years before France was swept by revolution, it was at the time a document striking in its advocacy of democracy.

The adoption of the U.S. Constitution, which created a federal republic out of 13 former British colonies, was not an

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[1] John W. Caughey and Ernest R. May, *A History of the United States*, Rand McNally & Company, Chicago, 1964, p. 104.

accident or the result of the brilliant enlightenment of a handful of gifted individuals. Rather, it was the natural outgrowth of the economic, political, social and ideological necessities of American society of that period. The de facto disintegration of the Confederation, the various excesses of the state governments, public remonstrances and economic dislocation precipitated the need to create a state with strong central authority. The Confederation, formed primarily to organize an army to fight the British crown, in the end proved too fragile. Public opinion drifted toward the establishment of a sturdy federal state, of "a more perfect Union," as was noted in the Preamble to the Constitution.

In May of 1787 fifty-five men representing 12 of the 13 confederate states traveled to Philadelphia to draft and adopt a constitution. Known as the Constitutional Convention, it assembled under the chairmanship of George Washington. It has been remarked by American historians that it would be impossible to bring together under one roof so impressive a body of intellects again simply for a lack of apt minds. Americans respectfully call the participants of the Convention their Founding Fathers. Indeed, among the delegates to the Convention were some of the most distinguished statesmen, politicians, scholars, philosophers and lawyers of the day, including such names as George Washington, Alexander Hamilton, Benjamin Franklin, James Madison, Edmund Randolph and James Wilson. Some of the most active of the revolutionaries, however, were absent from the Convention. Thomas Jefferson was in France, Patrick Henry declined to stand for election as a delegate, John Adams was in England as ambassador, and three other revolutionary figures—Thomas Paine, Samuel Adams and Christopher Gadsen—were not elected as delegates. Consequently, the radicals were poorly represented.

Faced by the imminent collapse of the Confederation and the specter of a civil war, the Convention focused its attention on three tasks: blocking the further advance of the revolution, forming "a more perfect Union," and securely guaranteeing the rights of property-owners. At the closed sessions of the Convention the delegates unfolded their views with utter candor, not fearing to provoke the wrath of the public. It was only natural that the views they advocated and the decisions they made were determined by the objective circumstances of their day and age. The ideas and views expressed by the delegates in the course of drafting the Constitution were influenced by a variety of factors, the most important of which were the experience of colonial government and of the constitutional rule of the independent states, the main premises of the British form of government idealized by them, and the political doctrines of the

time, especially those of Locke and Montesquieu. However, having ultimate influence were the economic and political interests of the propertied class.

The Constitution that resulted dealt only briefly with the question of rights and liberties of citizens and delegated to the states everything that concerned powers of state and local governments. Putting forth the principle of "checks and balances" to regulate relations between what Americans call the three branches of power, the Constitution failed to impart to them full equality. It rejected the British system under which parliament was vested with supreme authority, instead granting the executive branch certain, albeit veiled, advantages. The Convention's task had been to form "a more perfect Union," a mission it fulfilled.

The Preamble to the U.S. Constitution declares that "We, the people of the United States, in order to form a more perfect Union, establish justice, institute domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The declarative formulations of the Preamble, while not having binding force, nevertheless expressed certain ideals of American constitutionalism and so worked their way firmly into political and legal lexicon. On the 200th anniversary of the U.S. Constitution, the question ought to be asked, to what extent have the noble intentions of the Constitution's authors, set forth so eloquently in the document's Preamble, been realized?

The solemn proclamation of the Constitution in 1787 in the name of the people had no real foundation. The word "people" was understood then to mean those citizens of the 13 states who had been invested with the right to vote, namely, free white male property-owners having a permanent residence, having attained the legal age set by each of the state constitutions and having met other requirements. Other free citizens—the landless, women, migrants and those in servitude, and, of course, slaves—were ineligible to vote, even though they made up a majority of the country's adult population.

It has long been noted how similar the social backgrounds of the Philadelphia Convention delegates were: all were representatives of the economically dominant class and the views they expounded reflected utterly finite class interests. And although the Founding Fathers were outstanding political thinkers of their time, their social backgrounds witness the degree to which they were removed from the people. They comprised an exclusive club of property-owners, of rich men, among whom were plantation-owners, slaveholders, bankers,

holders of government bonds, shipowners, etc.

The "more perfect Union" they formed is today swept by a crisis of authority in many respects deforming the political system molded over the decades. The executive branch gradually usurps powers traditionally belonging to the legislative branch—despite constitutional checks and balances, and the federal government tends to expand its powers to the detriment of the traditional prerogatives of states. The altering of the balance created by the Constitution takes place in a way requiring no changes to be made in the text of the document. The Constitution itself can under no circumstances serve as a guidebook to the political system of the United States. Rather, the system took shape and its main tenets were institutionalized outside the context of the Constitution. In the Constitution you will find no mention, for instance, of how the U.S. government is structured or into which departments or state agencies it is divided. Everybody knows how large a role in policy-making is played by such institutions as the White House Office, the National Security Council, the standing committees of both houses of Congress and other agencies. All of these, however, were created and function without having been ordained by the Constitution. Were we to compare the current operations of the government with the guidelines laid down in the Constitution, we would find little in common between the two. For instance, the Constitution says nothing about political parties, although their role is central to the filling of government posts, and fails to establish any procedures for nomination to elected offices. A host of other political institutions in the United States were founded and function without explicit constitutional provisions, and in some cases, the powers that be act contrary to and in violation of the Constitution.

"A constitution is fictitious when law and reality diverge; it is not fictitious when they coincide," wrote Lenin.[1] Lenin had in mind here the degree to which a state's legally adopted constitution corresponds to the way authority is exercised in practice. In the United States the real, "living constitution" is composed of the myriad laws passed by Congress, presidential and government decrees, plus constitutional conventions. Moreover, the meaning of the constitutional provisions is constantly altered during the process of judicial review, the changes following swings in the political mood.

Today, the justice and blessings of liberty the Founding Fathers promised their posterity in the Preamble have been superseded by continuing discrimination against blacks and

[1] V.I. Lenin, "How the Socialist-Revolutionaries Sum Up the Revolution and How the Revolution Has Summed Them Up", *Collected Works*, Vol. 15, Progress Publishers, Moscow, 1977, p. 336.

other minorities, harassment of people who disagree with the policies of the ruling circles, police abuses, and attacks on due process guarantees of justice and individual rights.

The United States is also a long way from the idylls of domestic tranquility. From the one side American society is rocked by class confrontations in the form of strikes by workers, riots by blacks who have lost all hope, and political demonstrations. On the other side the security and tranquility of Americans are threatened by criminal elements. Rampant crime precipitated by the social evils of capitalism has transformed American cities into what the top U.S. jurist, Chief Justice Warren Burger, described as the "reign of terror."[1]

The promise of general welfare is an outright joke to the millions of unemployed, propertyless and outcasts. According to statistics published in the mid-1980s, in the capitalist world's richest nation one in five go hungry, one in seven live below the official poverty level, around 8 million are unemployed, more than 2 million do not have a roof over their head, and in many states infant mortality is on the rise.

During the Reagan Administration, the government's social programs, called on to promote, albeit symbolically, the general welfare of the nation, have been drastically cut with the difference being reallocated to support "common defense." The concept of defense has changed radically over the years. The U.S. armed forces are no longer a means for rebuffing a foreign invasion or for defending independence as the Founding Fathers meant them to be. Rather, they have become a military machine for waging aggressive wars and promoting the country's political expansion throughout the world. How can the concept of defense be harmonized with the fact that for over 30 years the United States has led the race for the creation of first strike nuclear weapons? Under the Reagan Administration a comprehensive strategic program for the 1980s was adopted, designed to rearm America and achieve military superiority. The men in Washington have set the goal of making "a more perfect Union" the world's leading military power. Yet, as everyone knows, military superiority has never been needed for defensive purposes, but rather for the carrying out of imperial ambitions.

Since its adoption two centuries ago the U.S. Constitution has been the object of both praise and censure. Whatever the case, it has been of tremendous significance to American political culture. As Harvard Professor John Ely has

[1] *Time*, March 23, 1981, p. 18.

pointed out, "once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny."[1]

Even in America of today the Constitution, steeped as it is in pragmatism, is regarded by some as a heaven-inspired document born out of the wisdom of the legendary Founding Fathers. The document occupies a special place in the government's arsenal of ideological weaponry. As Professor Philip Bobbitt, a former White House advisor under the Reagan Administration, sees it, "The Constitution is our Mona Lisa, our Eiffel Tower, our Marseillaise."[2] His thoughts are echoed by Professor Albert Blaustein, who claims that the U.S. Constitution is the nation's "most important export."[3] And although there is no Constitution Day among American national holidays (July 4th, Independence Day, is celebrated instead, marking the signing of the Declaration of Independence, which is formally not a source of constitutional law), government officials launched in 1983 a broad propaganda campaign to mark the 200th anniversary of the Constitution in 1987. For this purpose a Bicentennial Commission was formed, articles, brochures and booklets published, and government officials gave speeches and lectures on the Constitution. The aim of this campaign is to extoll American constitutionalism and the political system laid down by the Constitution as the universal standard of democracy and justice.

As the focus of our analysis of American constitutionalism we have taken four of its key premises—the separation of powers, federalism, judicial review and respect for the rights and freedoms of citizens. Through an analysis of these principles we will attempt to discern the fate of other constitutional ideals implicit in these premises or closely linked to them and trace the evolution, transformation and deformation of American constitutionalism as a whole.

[1] John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review*, Harvard University Press, Cambridge, Mass., 1980, p. 6.

[2] Philip Bobbitt, *Constitutional Fate. Theory of the Constitution*, Oxford University Press, N. Y., 1982, p. 185.

[3] *National Forum*, Fall 1984, No. 4, p. 14.

Chapter 1

SEPARATION OF POWERS. CONSTITUTIONAL THEORY AND POLITICAL REALITY

Separation of powers is one of the oldest premises of American constitutionalism, being borrowed from the English at the end of the 17th century and always in operation ever since. From the moment of its appearance on the American continent the concept has undergone a long and complicated evolution. During the colonial era of America, it was a political idea adopted by the colonists as a slogan in the battle against British rule. After the proclamation of independence in 1776, the concept became institutionalized and acquired the form of a constitutional principle embedded in the fundamental laws of the 13 independent states. By the time of the Constitutional Convention in Philadelphia, May 1787, Americans were not only familiar with the theory of separation of powers but had practical experience of its application as perceived by American political and legal scholars.

At the basis of the organization, scope of powers and interaction of the supreme bodies of power the Founding Fathers put the American version of separation of powers, which became known as the system of checks and balances. The Framers of the Constitution, however, had no intention of creating three isolated, totally independent branches of power. They knew that power of the government was indivisible and also knew who it belonged to in reality. For the exercising of this power, they created, on the basis of the principle of checks and balances, three interdependent branches of government—legislative, executive and judicial. At the federal level the three branches are represented by Congress, the President, and the Supreme Court. Both the American Constitution and the system of checks and balances created by it reflected "the actual relation of forces in the class struggle."[1]

The principle of separation of powers as applied in American practice never came close to matching the form of it that was embedded in the Constitution. The organization and relationship of the three branches of government, like the

[1] V.I. Lenin, "How the Socialist-Revolutionaries Sum Up the Revolution and How the Revolution Has Summed Them Up", *Collected Works*, Vol. 15, p. 336.

entire political and legal structure, have always depended on the balance of political, social and economic forces at a given moment, on the current requirements of the ruling class. The American bourgeoisie applied the principle of separation of powers only as it suited their needs.

At various periods of American society the system of checks and balances took on specific characteristics. The scope of powers of Congress, the President and the Supreme Court underwent change, new forms of relations between them emerged, and in a number of cases the actual status of the three branches within the system of checks and balances was redefined. Yet despite all the major tremors that periodically rock the upper echelons of power in America, the principle of separation of powers has never ceased to exist. Such tremors have always been precipitated by the class contradictions within the U.S. ruling elite. Even the Watergate scandal, as much damage as it did, never went beyond the bounds of a "family" feud. In this respect it is worth quoting the Soviet historian N.N. Yakovlev, who wrote, "The battle was waged only among the most powerful in the oligarchic republic. The millions of others who witnessed the event could no more influence the outcome of the battle than a television viewer watching the action unfurl before him... What took place was very simple from the standpoint of American political theory—the flanks sorted out, the system of separation of powers was once again placed on an even keel."[1]

The concept of separation of powers is a natural expression of bourgeois democracy. Under capitalism the separation of powers is done away with only by fascism, an openly terrorist regime of the most reactionary elements of monopoly capital.

The concept of separation of powers has grown in importance during the period of state-monopoly capitalism, when the power of both the government as a whole and separate government bodies is significantly expanded in comparison with preceding periods in society. This partially explains the special interest that American constitutional scholars display today in the issue of separation of powers and the system of checks and balances.

1. THEORETICAL AND CONSTITUTIONAL BASIS OF SEPARATION OF POWERS

The premises underlying the separation of powers as a basis of government and constitutionalism spread to the American

[1] *The USA: Political Thought and History*, ed. N.N. Yakovlev, Moscow, 1976, p. 12 (in Russian).

colonies soon after the publication in 1689 of John Locke's *The Second Treatise of Civil Government*. Locke was the first bourgeois theorist to advance the idea of separation of powers, an idea that a few decades later the French Enlightener Charles Montesquieu was to pick up on and develop.

The young American bourgeoisie's ready acceptance of the idea of separation of powers was foreordained, since the political situation in the British colonies in North America in the years before the revolution was nearly identical to that which obtained in England at the end of the 17th century and in France in the mid-18th century. Karl Marx and Frederick Engels wrote in *The German Ideology*, "The ruling ideas are nothing more than the ideal expression of the dominant material relations, the dominant material relations grasped as ideas; hence of the relations which make the one class the ruling one, therefore, the ideas of its dominance... For instance, in an age and in a country where royal power, aristocracy and bourgeoisie are contending for domination and where, therefore, domination is shared, the doctrine of the separation of powers proves to be the dominant idea and is expressed as an 'eternal law'."[1]

In the years leading up to the revolution the American colonists harbored deep mistrust of the British government, at whose hand they had experienced numerous wrongs and injustices. The British crown ruled the colonies through its agents with almost unlimited control. The interests of the colonies themselves were neglected, with everything being done for the welfare of the imperial country, i.e., the English bourgeoisie and aristocracy. The colonists could not count on the support and understanding of the British parliament, which rarely entered into conflict with the crown concerning the rule of overseas possessions in the New World. This explained the peculiarly American mistrust of the monarchy and the people's fear of it. They identified the monarchy with tyranny.

The body of political theory developed by the colonists brought into question not only the methods by which England ruled its American possessions but also the British political system itself. The conviction became widespread that the colonies and England itself were suffering from the same moral decay that had infected ancient republics before their fall. In America, attempts to construe and apply the idea of separation of powers were not without their problems. European experience in governing and European theories were drawn on to create a model of separation of powers that would conform to the notion that America was a chosen

[1] Karl Marx, Frederick Engels, *Collected Works*, Vol. 5, Progress Publishers, Moscow, 1976, p. 59.

nation with an exceptional path to follow.

Before the 1770s, the most widely accepted theory of government in the colonies was that of John Locke. Locke's theory had the advantage in that it corresponded to the American's wish to create a system of government in which the executive power so detested by them and personified by the British crown and its governors would be deprived of the possibility of growing into open tyranny. Were Locke's recipes to be followed, three separate branches of government were to be set up: a legislative branch (parliament) which would adopt laws, an executive branch (the government) that would execute the laws, and a federal branch, whose area of authority would be confined to foreign policy. The powers of the federal branch would be exercised by specially created bodies. In the structure proposed by Locke judicial powers would be vested in the executive branch.[1]

What attracted the colonists to the Lockean theory of government most was the precept of the inequality of the separate branches. In Locke's scheme, the legislative branch was to be superior and rule over the other branches. Politicians of the day saw in legislative assemblies a guarantee against tyranny of the executive branch. What's more, they saw in the theory of separation of powers a way of checking the detested executive power associated with the British crown. The anti-British bent predetermined an overly enthusiastic reception of the theory, since it was seen as a cure-all and a way of achieving democratic ends. Thus, until 1776 separation of powers was nothing more than a slogan, a political theory.

The situation changed, however, when the colonies became independent states and began to adopt their own constitutions and structure of government.

The implementation of the Lockean idea of the supremacy of legislative branch had unforeseen consequences which significantly altered the political attitudes of Americans, now no longer colonists but citizens of independent states that had raised the banner of revolutionary war against British rule. The legislatures that were created in the states usurped enormous powers and in many cases assumed full control over not only legislative but also executive functions. The legislatures in the states of the transition period confiscated property, coined money, collected taxes, imposed sentences and constantly altered and revised laws. In short, state legislatures in a number of instances acted similar to a collective tyranny, violating all the interdicts of the theory of separation of powers in its unadulterated form.

[1] John Locke, *The Second Treatise of Civil Government*, Basil Blackwell, Oxford, 1948, pp. 66-80.

In *The Federalist Papers*, Thomas Jefferson described in pungent terms the legislatures of the transition period: "All the powers of government, legislative, executive, and judiciary, result in the legislative body. The concentrating of these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one... A little will it avail us, that they are chosen by ourselves. An *elective despotism* was not the government we fought for."[1]

The bitter experiences of legislative excesses caused the political thinkers in the states to become disillusioned with the Lockean model of separation of powers with its peculiarly British insistence on the supremacy of the parliament. Instead, they turned to the scheme of separation of powers offered by Charles Montesquieu.

Montesquieu's concept of the separation of powers drew heavily on the experience of the European bourgeoisie's struggle against absolutism and was adapted to the social and political conditions obtaining in the Old World. Montesquieu argued that freedom, which he saw as the right to do anything allowed by law, could be guaranteed only in a state in which there existed separation of powers. The concept of separation of powers expounded by Montesquieu in his celebrated *On the Spirit of Laws*, was fundamentally different from that published by Locke, as it happened, in the year Montesquieu was born.

Montesquieu distinguished three branches, a legislative, executive and judicial, each of which was to be represented by a public authority, parliament, the king and the courts, respectively. Each of the branches was to represent a specific segment of society: the executive would belong to the aristocracy, and the legislature would represent the Third Estate. In the set-up proposed by Montesquieu, no branch would have an advantage; they would be fully equal and balance each other so as to forestall the emergence of despotism and protect freedom. On the issue of guaranteeing freedom and precluding despotism Montesquieu wrote: "Political freedom can be found only where there is no abuse of authority. However, years of experience have revealed to us that a person invested with authority is inclined to abuse it and to hold on to power to the last... To preclude such abuse of authority it is necessary, as follows from the very nature of things, to make one authority restrain another... When legislative and executive authority is combined in a single

[1] *The Federalist. A Commentary on the Constitution of the United States*, ed. Henry Cabot Lodge, G.P. Putnam's Sons, N. Y., 1888, p. 311.

body ... freedom cannot exist... On the other hand, there can be no freedom should the judiciary not be divorced from the executive and legislative... And all would be lost should the same person or body, whether noble or popular, begin to exercise all three powers."[1]

The experience of constitutional government in the 13 states convinced American political thinkers of the need of a balanced system of separation of powers in order to preclude the possibility that a tyrannical government would emerge. This conviction was prompted by the experience in founding political institutions in the states. However, another source of scepticism was the experience with the amorphous Confederation which quickly demonstrated its impotence and unsuitability as an effective form of uniting the 13 states in a single government. Calls were made for a revision of the Articles of Confederation the very moment they came into force. In 1782, but a year after their adoption, the New York legislature proposed the calling of a convention to which all the states would be invited for revising and amending the Articles of Confederation. It was only natural that the idea of forming "a more perfect Union" could not evolve in isolation from American conceptions of the separation of powers. By the time the Constitutional Convention assembled in Philadelphia the theory of separation of powers had almost completed its evolution into a constitutional principle which ultimately became an integral part of the American system of checks and balances.

In the period immediately preceding the Constitutional Convention in Philadelphia in 1787 open discontent was voiced both over the experience of governing in the states and over relations among the states within the Confederation. A search for more perfect and, for the ruling class, more convenient forms of governing the states and the large republic which should unite the states led in the direction of the creation of a peculiarly American form of separation of powers. The Americans rejected the British concept under which the legislative branch was supreme, preferring instead a system under which all power would be distributed equally among the three branches of government. What was important to them was to keep in check the ambitions of the legislative branch. This point was stressed in the writings of the leading American theorists of the time, in particular those of James Madison and Alexander Hamilton.

In the years of the Confederation the following concept took shape of how to structure the government system. First,

[1] Charles Montesquieu, *De l'Esprit des Lois*, Vol. 2, Societe les Belles Lettres, Paris, 1955, pp. 61, 63, 64.

it emphasized that the people was considered to be the sovereign and not government institutions, which should have only those powers explicitly delegated to them by the people. Second, none of the institutions could claim to be the sole spokesman for the popular will. They could express this will only in concert and to an equal degree. All the branches of power would thus express the will of the people upon the latter's authority, in line with the functions ascribed to them and within the boundaries fixed by a written constitution. Power as such was seen as monolithic, but authorization of power was divided. The indivisibility of power was derived from the concept of a single sovereignty, the source of which in theory is the people.

The people had no idea of which premises were being proposed for incorporation in a constitution and were unable to follow their discussion as the Constitutional Convention was held behind closed doors and the debate proceeded in the strictest secrecy. What's more, less than 3 percent of the population took part in the ratification of the Constitution. The majority of the architects of the Constitution feared the popular masses and were opposed to all notions of genuine democracy. The Constitution was the product of the pragmatic class views of property-owners who were least of all concerned about the good of the people. In the view of the Soviet scholar V.O. Pechatnov, "The Founding Fathers acting in total secrecy sanctioned various forms of the creation of a strong bourgeois state. They were fully aware of the chasm between their own interests and those of the people and, had it been necessary, were prepared to take extreme actions."[1]

To ensure both the stability and the flexibility of the governing machinery of the bourgeoisie the distribution of power was envisaged both horizontally (separation of powers) and vertically (federalism). They also provided for the creation of a system of interdependence that would serve as a form of precluding the abuse of powers by any of the branches. The distribution of power horizontally among the three branches of government, the legislature, the executive and the judiciary, was supplemented by a vertical division of power that assumed a federal form of government under which all powers not granted explicitly to the Union were reserved by the states.

An analysis of the text of the Constitution and the numerous commentaries and interpretations that have been offered begs the conclusion that embodied in it is not the classical notion of separation of powers but a sharing of certain powers

[1] V.O. Pechatnov, *Hamilton and Jefferson*, Moscow, 1984, p. 65 (in Russian).

among the three branches of government relative to their specific provinces. The American statesmen who wrote the Constitution were not after a theoretically perfect and logically consistent configuration of the separation of powers. The American version of this concept was rooted not so much in a theoretical inheritance as in the experience of governing the states both during the colonial period and after.

It is a curious fact that, strictly speaking, the Constitution recognizes only two powers. Section 1 of Article II, for instance, states that "The executive power shall be vested in a President of the United States of America." Section 1 of Article III reads, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Compare this to Section 1 of Article I, which proclaims, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Thus, were we to take the Constitution literally, Congress is vested with certain legislative powers ("herein granted"), but not with the legislative power in general. This can hardly be written off as an accident or an editing error. Rather, it should be viewed as a reflection of the fear prevailing at the time of a possible tyranny of the legislature.

A delineation of the powers of the three branches is dealt with in the Constitution in rather general terms. The Founding Fathers operated on the assumption that the notions of executive power and judicial power implied corresponding functional roles, i.e., the execution of the laws and the administration of justice, which is why these two notions were not defined in the Constitution. On the other hand, the area of competency of Congress, which was not formally vested by the Constitution with legislative powers, is defined rather precisely.

Section 8 of Article I of the Constitution enumerates specific areas of authority of Congress as the highest legislature. Congress has the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the country; to borrow money for the needs of the government; regulate foreign and inter-state commerce; coin money; fix the standard of weights and measures; establish uniform rules of naturalization and uniform laws on bankruptcies, patents and copyrights; establish federal courts and post-offices; declare war, raise armies and appropriate money for their maintenance; dispose of land and other federal property.

Section 3 of Article IV supplements the above-named powers. In addition, Section 9 of Article I lists the restrictions on Congressional powers (prohibiting the limitation of the

writ of habeas corpus in peacetime, the passing of a bill of attainder and ex post facto laws, the granting of titles of nobility and some others). The Bill of Rights, which significantly amends the Constitution, contains a number of other limitations on Congressional powers.

While the original notion of separation of powers transplanted from the European continent was only partly adopted in the Constitution, the purely American theory of checks and balances was elaborated in great detail.

The system of checks and balances that is the corner-stone of the organization and functioning of federal governmental bodies in the United States is based on the following principles.

First, all three branches recruit their office-holders in different ways and from different sources. Congress consists of two houses, each of which is formed in a special way. The House of Representatives is elected by the people, in other words, by the electorate, while the Senate, until 1913, was elected by state legislatures. Chief Executive, the President, is elected indirectly, by an electoral college which in turn is elected by the people. Members of the Supreme Court are appointed by the President with the concurrence of the Senate.

Second, in accordance with the Constitution, federal office-holders are elected for different terms. The whole House of Representatives is elected every two years. The Senate has no fixed term of authority since one-third of its members stand for election every two years.

The President is elected for a four-year term, and the tenure of Supreme Court justices is unlimited.

The Founding Fathers thought that establishing different sources of recruitment and varied terms of office for the three branches would guarantee a degree of independence of the federal bodies and prevent a simultaneous renewal of their membership, so that stability and continuity would reign in the upper echelons of government.

Third, the architects of the checks and balances scheme intended to create a mechanism wherein each of the branches would be poised to neutralize the tendency of any other branch to usurp the powers of the others. It was out of these considerations that Congress received the right to veto legislative proposals of the President (including financial bills) which the latter might introduce through his supporters in Congress. The Senate can reject any nomination to fill a federal office made by the President, since any such nomination requires the "advice and consent" of the Senate, meaning two-thirds of the Senators must approve a nomination. Finally, Congress may prosecute the President by means of impeachment and drive him out of office before his term is over.

The Constitution gives the President the power of suspensive veto over legislation passed by both houses of Congress. Should the President decide to use this power, his veto can be overruled only by a two-thirds vote of both houses (normal bills and resolutions require for approval only a simple majority of both houses).

Justices of the Supreme Court are appointed by the President "with the advice and consent" of the Senate, requiring a two-thirds vote. Formally the Supreme Court was created as the highest court of appeals for federal cases and as a trial court for a limited number of cases spelled out in the Constitution. In fact, the Constitution invested the Supreme Court with the virtual right of constitutional review, which after its emergence has allowed the Court to intervene in legislative and executive prerogatives. A Supreme Court justice can be removed from office through the procedure of impeachment.

It should be noted that within the system of checks and balances the largest share of limitations was directed against the legislative branch. This was reflected not only in the levers with which the Constitution provided the President and the Supreme Court to control the actions of Congress. In Congress itself the "upper" house—the Senate which was to be elected by state legislatures—was made equal in rights with the popularly elected House of Representatives in order to restrain possible radical impulses of its members. Such precautions were taken to alleviate the fears of the Founding Fathers of a possible tyrannical dictatorship of the popular assembly.

The system of checks and balances was designed not only to prevent the tendency of one branch to usurp the powers of the rest, but also to ensure the stability of governmental and legal institutions and the continuous functioning of the federal government.

The Federalist Papers, a collection of essays written by Alexander Hamilton, James Madison and John Jay and initially published in New York newspapers, provided a detailed theoretical argument for the system of checks and balances in the American form. The essays, which appeared in print signed "Publius," were aimed to persuade the public of the need to ratify the Constitution. They laid down the foundations for and asserted the democratic nature of the governmental structure provided for in the Constitution.

The detailed argument of the Federalists in favor of setting up a system of checks and balances, otherwise known as the separation of powers, was fully subordinated to the task of crafting an indestructible federation of states with a republican form of government that would guarantee rights and freedoms in their bourgeois-democratic interpretation.

In a series of articles (No. 47: "The Separation of Powers: Theory and Practice"; No. 48: "The Separation of Powers: A Hedge Against Tyranny?"; No. 49: "Doubts About Democracy"; and No. 51: "The Social Foundations of Political Freedom"), James Madison was proving the need for a system of separation of powers, as this system was comprehended in America.

He argued that in essence power was monolithic, but the "mass of power" should be divided among the constitutional parts of the government. In this way there would be not three isolated branches but a single subdivided authority. The three branches of monolithic power could not be isolated, since this was impossible in practical terms. Yet the theory itself of separation of powers does not require that the legislative, executive and judicial departments be wholly independent of each other. So that the principle of separation of powers be properly implemented, each of the branches had to be provided with a constitutional means of keeping the others in check.

Madison also reasoned that the powers invested in one department should not be exercised, either directly or indirectly, by another department. Furthermore, none of the departments were to have any overruling influence whatever on the way another department performed its functions. Rather, each would keep the others in check within the limits of the powers allocated to them. This implied that the President would exercise executive powers, Congress would exercise legislative powers and the Supreme Court would be confined to judicial matters. Having painted such an idealistic picture, Madison cautiously remarked: "The most difficult task is to provide some practical security for each, against the invasion of the others."[1]

Thus Madison viewed constitutional guarantees as insufficient to maintain a stable balance among the three branches of government. He thought additional restraints would be needed to protect a weaker branch from having its prerogatives usurped by its stronger counterpart. Who was this indefatigable usurper? Madison explained to the public that under monarchic forms of government the executive branch posed the greatest danger to democracy, and that under a republican system the legislature was to be feared.

Madison's fears of the usurpatory tendencies of the legislature went hand-in-hand with his doubts about the ability of the Constitution to guarantee the proper implementation of separation of powers. Madison was convinced that "a mere

[1] James Madison, "The Separation of Powers: A Hedge Against Tyranny?", *The Federalist Papers*, selected and with an introduction by Andrew Hacker, Washington Square Press, N. Y., 1976, p. 111.

demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[1]

Madison gave considerable space in his argument to the issue of whether or not the people could be trusted to resolve disputes between the branches of power. In his view, the people could not be trusted to maintain the balance of power constantly as they lacked sufficient wisdom and were ruled by passion and not reason. He believed that appealing to the people in matters of constitutional politics would disturb public harmony.

Ultimately Madison came to the conclusion that neither constitutional limitations nor the involvement of the people in matters of government would suffice to reach the desired goal of achieving a balance between the branches. "Mere declarations in the written constitution, are not sufficient to restrain the several departments within their legal limits."[2]

Turning to the means for reaching this goal, Madison formulated what he considered the "fatal question" in the following way: "To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution?" Since the external means of restraint proved ineffective, he suggested creating an internal pattern of relationship among the departments which would "be the means of keeping each other in their proper places." Each department should be vested with its own will. In order to achieve this the members of each department should be removed as far as possible from the process of appointing the members of the other departments. All appointments to the legislative, executive and judicial branch should originate from the same source—the people. Procedures for filling offices in the different branches should be totally isolated. But, Madison argued, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[3]

He cautioned that each of the departments could not be given equal means of defending itself, since in a republic the legislative branch always dominated. In order to prevent this domination, the legislature should be divided into two branches (houses) with different election procedures and

[1] Ibid., p. 116.
[2] J. Madison, "Doubts About Democracy", *The Federalist Papers*, p. 121.
[3] Ibid., pp. 121, 122.

different principles of functioning.

He proposed a scheme according to which Congress would assume the role of a counterbalance to the powers of the President and the Supreme Court, while the Senate would keep in check the House of Representatives. Thus the legislative branch would be balanced internally in order to prevent a "tyranny of the legislature." To reinforce this balance different terms of office for the two houses were established, different procedures for the elections of members were instituted and the two houses were made equal in the legislative process. The ultimate goal was to create a legislative branch that, being internally balanced, would be able to keep itself in check, be sensitive to changes in public attitudes (members of the House of Representatives have a mandate of two years) and maintain its own stability and continuity of policy (a third of the Senate is renewed every two years, and under no circumstances can there be the re-election of the whole Senate).

Madison was constantly on guard not only over the possibility of Congress usurping the "whole mass of power," but also over the presumed weakness of the executive branch, that is of the President. Concerned about these problems even more than Madison was Alexander Hamilton who was always more conservative than the former.

Central to Hamilton's defense of the separation of powers was the view that the executive branch should be potent and dynamic. He sharply assailed those who argued that a strong executive was incompatible with a republican form of government. "Energy in the executive is a leading character in the definition of good government."[1] A strong executive was necessary to defend society from an external attack. Without one it would be impossible to implement laws consistently and even-handedly, protect property from various kinds of unlawful acts, secure liberty, etc.

A weak executive branch, in Hamilton's opinion, would necessarily result in not only a weak but wicked government. A strong executive branch having a fixed set of ingredients was needed to avoid such evils. Hamilton divided these ingredients into two groups.

In the first were ingredients helping to maintain the energy of the executive branch, its unity, duration and competent powers, and its proper place in the system of powers.

The second set consisted of those ingredients needed to guarantee the stability of the republican system and determining the proper dependence of the executive on the people and its responsibilities before them.

Hamilton was convinced that all politicians and statesmen

[1] Alexander Hamilton, "The President", *The Federalist Papers*, p. 133.

known as men of reason and fairness would agree in the necessity of a single executive and a numerous legislature.

In his substantiation of his view that it was necessary to concentrate power and responsibility, Hamilton introduced various arguments and cited examples from the practice of other countries. He maintained that plurality in the executive branch would unavoidably spawn internal disputes over important policy matters. Hamilton, who was never a fan of representative democracy, rejected the British application of the theory of separation of powers with its supremacy of the legislature and instead of an equilibrium of powers preferred a scheme under which a single supreme magistrate in the person of the President would dominate.

Of particular interest in the context of the system of checks and balances and its later evolution are Hamilton's views on the role of the Supreme Court and the American judicial system as a whole.

He noted that the judicial branch as presented in the Constitution contained three main elements which determined the judiciary's relationship to the other two branches. First, the method fixed by the Constitution for appointing federal judges assumed the participation in this process of the President and the Senate. Second, judges held office virtually for life, since the formula of "good behavior for the continuance in office" meant that they could be removed from office only through impeachment. The third peculiarity Hamilton referred to was the division of jurisdiction among different courts and the establishment of a certain relationship between them.

It was Hamilton's belief that the standard of good behavior for determining the length of office of judges posed a "barrier to the encroachments and oppressions of the representative body."[1] He added that the judicial branch by its very nature would always be the least dangerous to the political rights. Hamilton argued that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment."[2]

Hamilton's idealization of the judicial branch as a socially neutral force and his deliberate downplaying of the role of the Supreme Court within the system of checks and balances were not without purpose. His intention was to transform de facto the "harmless" judicial branch into an effective instrument of constitutional review.

[1] Ibid., p. 142.
[2] Ibid., p. 143.

Pursuing his argument about the weekness of the judiciary, Hamilton injected the additional plea that the judiciary could not successfully attack the other branches of government, that it could only with great effort defend itself from encroachments and that it was incapable of threatening the "general liberty of the people." On the other hand, the judicial branch was in continual jeopardy of being overpowered by the executive and legislature, especially if the two joined forces. The best guarantee against this risk, in Hamilton's view, was permanency in office for judges.

Hamilton was firmly convinced that an independent judiciary was essential for the kind of government envisioned by the Constitution, since only the courts would be empowered to proclaim null and void acts passed by the legislature that were in violation of the Constitution. It was this consideration that spawned the idea of constitutional review to be carried out by the judiciary as an important component of the system of checks and balances.

The system of government created by the Constitution of 1787 was the final product of sometimes conflicting political and economic tendencies, practical experience and theory. Even two centuries later, American political and legal scholars are unable to give a conclusive answer on what the practical implications of the system of checks and balances were. As one American scholar postulated, "What would eventually emerge from these tensions between liberty and authority, between society and its instruments of government? For one thing, a political style, a way of doing and viewing public affairs in which several sorts of biformities would be prevalent: pragmatic idealism, conservative liberalism, orderly violence, and moderate rebellion."[1]

The system of checks and balances envisioned by the Constitution was in no way a mere copy of the European theories on the separation of powers. It served as an expression, organizationally, and consolidation, constitutionally, of the interests of the wealthy and furthered the objective of forging a strong national government that would be capable of preserving the unity of the republic and guaranteeing security from attack and domestic tranquility for the consequent development of American capitalism.

The system of checks and balances was formally built on the principle of equality of separate branches capable of controlling and keeping each other in check. In reality, however, the entire system revolved around a single strong and energetic executive. The system is fully deserving of the appraisal given it by Frederick Engels: "The separation of powers ... is basically nothing but the profane industrial division of labour applied for purposes of simplification and control to the mechanism of the state. Just like all sacred, eternal and inviolable principles it is only applied as long as it suits existing conditions."[1]

[1] Michael Kammen, *People of Paradox. An Inquiry Concerning the Origins of American Civilization*, Alfred A. Knopf, N. Y., 1974, p. 165.

2. CHECKS AND BALANCES. A MODERN APPRAISAL

The system of checks and balances rooted in the Constitution, like all American governmental and legal system, has evolved and adapted to the constantly changing social and political conditions.

Today in the United States, as was the case almost throughout American history, the issue of separation of powers, or, if you will, the system of checks and balances, has been at the focus of attention of social scientists of various disciplines. The broad attention attracted by this issue, especially during periods of crises in American government, witnesses the vitality and import of this chief precept of American constitutionalism.

The Founding Fathers hoped that the mechanism of checks and balances they fashioned would work by the force of inertia. History, however, has shown that their brainchild has survived not through inertia but by virtue of its ability to change and adapt to new conditions.

The entire evolution of the system of checks and balances revolves mainly around the confrontation between the executive and the legislative branches. However, it is the presidency that has been in almost every case the main driving force of the government machinery. The presidency emerged from conflicts, even those which it had lost, always better poised for the next battle than the other branches. The confrontations between the White House and Capitol Hill never went beyond in-house disputes and never resulted in any significant social or political transformations in society. The system of separation of powers underwent modifications through amassing the fallout of every conflict.

The system of checks and balances could not function as a collegium of fully equal triumvirs since conflict and disproportions were built into the system by its framers from the very beginning. It was thought that the principle itself of separation of powers presumed a certain state of tension between the branches, which would help to balance the whole system.

From the first days of the existence of the United States,

[1] Karl Marx and Frederick Engels, "Articles from the *Neue Rheinische Zeitung*, June 1-November 7, 1848", *Collected Works*, Vol. 7, 1977, p. 204.

the system of checks and balances has never been tested under conditions of equality of three separated branches. Its entire life has been under the conspicuous dominance of the executive.

The powers of the President as the Chief Executive were outlined in Article II of the Constitution. The President was to be the Commander-in-Chief of the country's armed forces and the militia (National Guard) of the several states, should they be called up in a national emergency. As is stated in the Constitution, it is the President's duty to "take care that the laws be faithfully executed." He should from time to time inform Congress of the state of the Union, and recommend the necessary legislation; he has the right, on extraordinary occasions, to convene both Houses. As Chief Administrator, he may require the advice in writing of any cabinet member or agency head on matters pertaining to their respective offices. As Chief of State, he receives ambassadors and envoys from foreign states. The President may also grant reprieves and pardons to persons convicted under federal laws.

A number of the powers granted to the President must be carried out jointly with the Senate. For instance, with the "advice and consent of the Senate" the President can make international treaties, appoint ambassadors, consuls and other diplomatic personnel, federal judges (including justices of the Supreme Court) and other government officials and commission them. The President signs into law bills passed by the Senate and House of Representatives. And according to Section 7 of Article I, the President may veto bills passed by Congress, though the veto may be overruled by a two-thirds vote of Congress.

The fairly brief provisions of the Constitution relative to presidential powers left open the possibility of the expansion of the actual power of the President. This potential was spotted back at the beginning of the last century by the Russian publicist N.I. Kutuzov, who in an essay "On the Causes of Welfare and Greatness of Nations," published in 1820, reflected on the various forms of government, during which he noted that the United States, "for all of its superiority, to our surprise, carries seeds of future disorder which will spell disaster for itself and, possibly, disaster for all mankind." Reinforcing his thoughts with a reference to several features of the American system, Kutuzov added, "I am not going to explore the advantages and merits of their Constitution, I shall only note its mistakes. The President is the republic's chief official, elected for four years... His power as a servant of the republic seems to be vast... In a republic such power is all the more dangerous since it breeds the desire for permanent and unlimited rule, sparks power

struggles and leads the republic toward tyranny."[1]

The history of the United States has shown that the power of the presidency has indeed steadily expanded. Congress itself has largely promoted this process by delegating to the White House ever greater rights, and the Supreme Court has contributed to the process by upholding the legitimacy of such delegation of powers or by refusing to interfere in conflicts between Capitol Hill and the White House.

Expansion of the President's actual power became visible in 1828 with the election of Andrew Jackson, who was voted into office by electors chosen not by state legislatures as had been the tradition, but by public ballot. John D. Hicks, professor of American History at the University of California, Berkeley, pointed out that "the overwhelming majority by which he /Jackson/ was ushered into office, coupled with the fact that the American people themselves were responsible for the result, not a party caucus nor a college of electors nor a series of favorable legislatures, gave rise to the theory that the executive was endowed with greater authority than any other branch of the government."[2]

With the Jackson presidency (1829-1837) began a period of continuous expansion of executive powers and their leading role in the system of checks and balances. This expansion reached its peak during the presidency of Abraham Lincoln (1861-1865), which coincided with the Civil War years. The concentration of formidable powers in the hands of one man came about partly because of the requirements of wartime and because of the outstanding personality of Lincoln, and also as a result of a general tendency in that direction.

This process was temporarily interrupted by the death of Lincoln, who was followed into office by a series of feeble Presidents, from Andrew Johnson through William McKinley, during whose terms Congress played a dominant role.

It was not until Vice-President Theodore Roosevelt took office following the assassination of President McKinley in Sept. 1901 that the dominating role of the Chief Executive was restored. This date coincided with the entrance of American capitalism into its highest stage—imperialism.

In the 80 years since the United States has seen both strong and feeble Presidents. There were years of shared power, when a president and a majority in Congress belonged to the same party. There were also years of split government. But the main voice in the system of checks and balances as it

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[1] Cited in *"With Liberty Their Ties Eternal." Literary Criticism and Writings of the Decembrists*, Moscow, 1983, p. 257 (in Russian).

[2] John D. Hicks, *A Short History of American Democracy*, Houghton Mifflin Company, Boston, 1946, p. 228.

functions in reality is held and has always been held by the President. The dominating role of the presidency has not always been evident, as is witnessed by the Watergate period and the unusual presidency of Gerald Ford, when Congress increasingly challenged the White House.

But this did not change the essence of the matter.

A vital distinction between the system of checks and balances today and the way it was 200 years ago is the entirely different social foundation on which it operates. The theory of separation of powers advocated by Montesquieu and the Constitutional Convention assumed that each of the separate branches would derive its power from a distinct constituency. In that way, the government, the legislature and the courts would be controlled by different groups in society, who together would make up a substructure of the separate powers. This concept was imported to America from feudal Europe, which was ruled by estates comprised of the aristocracy, clergy, townsmen and peasantry. Feudalism as a socio-economic formation had never taken root in America. Capitalism rose up on totally virgin soil, with the exception of the slave-owning system in the South. Thus, in late-18th-century America, when the separation of powers was institutionalized, the socio-economic conditions were totally different than those in Europe at the time. Unlike Europeans, Americans were never exposed to prejudicial attitudes spawned by notions of belonging to a class or estate. This explains why the Founding Fathers referred only to a classless "people," a social category which they left unclarified. Their system of checks and balances formally rested on the people, however separate parts of that system were not linked to any specific classes or groups within society.

Two centuries ago, both the American Constitution and the system of checks and balances were framed without account being taken of social factors. Political parties and other social phenomena were ignored entirely. However, by the 20th century much had changed. Writing in 1920, the American historian Frederick Jackson Turner noted that "Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions."[1] Today, there is much discourse in the United States on the fact that the social forces behind the system of separation of powers are quite different than those that propped up the system in the era of the horse and carriage. What are these forces?

[1] F.J. Turner, *The Frontier in American History*, Henry Holt and Company, N. Y., 1920, p. 2.

During the era of state-monopoly capitalism a fourth element rose up within the triad of separate and competing branches—giant transnational corporations. American liberal scholars describe them as de facto governments. Ira Katznelson of the University of Chicago and Mark Kesselman of Columbia University, for example, take it for granted that the average American with his unshakeable belief in the principles of constitutionalism knows practically nothing about the real relationship between corporate capitalism and its private government at the one end and the constitutional government at the other. They point out that behind the facade of the American formula of "government of the people, by the people and for the people," the traditional separation of powers and other attributes of constitutionalism lie hidden forces that operate outside the Constitution, a confederacy of major corporations.

This group wields the ultimate influence on the decision-making process, defines policies of political parties and selects candidates for elective offices. It has developed close ties to Congress, the President and government agencies. "Most government policies were designed to help this group retain its favored position."[1]

Major corporations are linked with one another by joint directorates and by a whole number of organizations through which they exercise control over constitutional governments, federal and state, coordinating and directing their economic and political activities. According to Katznelson and Kesselman, informal coordination among corporations occurs through "umbrella" organizations like the National Association of Manufacturers, the National Industrial Conference Board, the United States Chamber of Commerce and the Committee for Economic Development. "These organizations act as spokespersons for broad sectors of business and define the common interest of corporate capitalism." Underscoring the existence of an informal understanding between the government and U.S. corporations, they conclude, "The anarchy of capitalist production, as well as resistance from workers, creates a need for government coordination. If public government did not serve the needs of capitalism, the two would go down together."[2] The bourgeois state is thus in the service of corporations, the largest of which, as suggested by American authors, define the parameters and set the direction of government policy. At the present stage of history, the mechanism of checks and balances within the system of separation of powers is subjected to the influence

[1] Ira Katznelson, Mark Kesselman, *The Politics of Power*, Harcourt Brace Jovanovich, Inc., N. Y., 1979, p. 69.

[2] Ibid., pp. 82, 83.

of some other forces spawned by state-monopoly capitalism.

Today most American political observers agree that the traditional pattern of checks and balances no longer reflects the true picture of how power is wielded in the United States. In practice an entirely different picture has taken shape of the power balance within the federal branches, a picture that has little in common with the one once envisioned at Philadelphia. Having appeared on the scene and entrenched themselves are new forces that wield tremendous influence on how the entire federal government functions.

Over the years, in the course of the execution of government power and the upholding of the flexible balance between its three branches, extra-constitutional institutions have come into being, exerting a considerable influence not only on the actions of Congress, the President and the Supreme Court, but on their staffing and make-up. Examples of such extra-constitutional power centers are the federal bureaucracy, political parties, pressure groups and the mass media. No realistic analysis could be made of the system of checks and balances as it works in America today without taking into account the role played by such institutions in the U.S. political system.

Such institutions already existed, albeit in an embryonic state, at the dawn of the American Republic, but their current significance and role in the political system go far beyond the impact they had two centuries ago.

During the period of state-monopoly capitalism, the *federal bureaucracy* has grown into a ramified and all-permeating institution that has become a permanent element within the upper echelons of power and assumes a relatively independent stance in its relations with the highest departments and offices operating within the constitutional system of checks and balances.

The federal bureaucracy is made up of the departments, independent agencies and so-called government corporations. By the early 1980s, the federal bureaucracy numbered 3 million civilian employees and 2 million military personnel. Because of its monster-like proportions, many U.S. authors regard the federal bureaucracy as the "fourth branch of government," having greater influence than Congress, the President or the Supreme Court. Almost all the parts of the federal bureaucracy derive their legal basis from acts of Congress or from presidential directives.

The various agencies of the federal bureaucracy have their head offices in the District of Columbia, although a majority of their local offices are spread all over the country.

Theoretically, the agencies and institutions making up the federal bureaucracy are assigned law-enforcement functions. It is their responsibility to implement laws passed by Congress, executive orders and execute decisions of the courts. The real role of the federal bureaucracy, however, extends far beyond the boundaries set by dogmata of constitutional law. The opinion has been expressed repeatedly in American political scholarship that, more than anyone else, it is the bureaucracy that implements the policy and makes political decisions. "Although the executive, the legislature, and the judiciary set some of the most important policies, the bureaucracy sets most, including those of the highest importance."[1]

Relations between the federal bureaucracy and Congress should in theory be quite simple, since the legislative branch establishes federal agencies, defines their powers and allocates them money for their functions. It would seem that under such an arrangement, Congress, through its numerous committees and subcommittees, would be able to control the activities of federal agencies. In practice, however, this is far from the case.

We should first of all note that independent regulatory agencies and other subdivisions of the federal bureaucracy in fact share legislative powers with Congress despite the constitutional prerogative of Congress to adopt legislative acts having the force of supreme law. These acts, or federal statutes, are passed by Congress within the limits defined by the Constitution for the Union. The federal agencies pass more regulations than Congress passes bills. The point, however, is not only that the federal bureaucracy churns out a volume of regulations exceeding congressional legislation. More importantly, its regulations cover a wider range of issues, thus having greater overall influence on the public domain than the statutes passed by Congress and signed into law by the President.

The conclusion can be readily made that the more complex the area that is to be regulated, the more legislators depend on bureaucrats. This dependency is particularly evident in cases when members of Congress are involved in the shaping of legislation having a direct bearing on the arms race. Legislators cannot be expected to possess the detailed expertise necessary to understand the complexities of such advanced hardware as neutron bombs, cruise and MX missiles.

From the point of view of the letter of the Constitution the relationship between the federal bureaucracy and the President is simple. The President is the Chief Executive. He can appoint federal officers with the concurrence of the

[1] Charles E. Lindblom, *The Policy-Making Process*, Prentice-Hall, Englewood Cliffs, N. J., 1980, p. 68.

Senate, dismiss them, and demand from them a written opinion on any issue that may interest him. There would seem to be no doubts relative to the role of the President in respect to the federal bureaucracy. Reality, however, has made considerable modifications in this relationship. American students of the federal government almost all agree that the President, notwithstanding his constitutional authority and titles, has little control over the federal bureaucracy. This situation can be explained only in part by the fact that Congress, and not the President, defines the status of federal commissions and agencies. Other factors also play a decisive role.

The federal bureaucracy is staffed by a corps of career public service officers, many of whom have served under many Presidents. As long-serving heads of agencies and subdivisions within the bureaucratic network they are adept at fending off attempts by superiors to interfere in their activities. They cultivate close relations with congressional committees, pressure groups, corporations, the media, and, of course, with fellow bureaucrats. The bureaucracy bosses exploit the built-in contradictions between the legislative and executive branches and make avail of various means to uphold their own positions on policy matters, no matter which President is occupying the White House. They can also use the mass media to polarize public opinion in order to head off possible changes affecting their agencies planned by the President or his staff.

The federal bureaucracy has swelled to such proportions that the President and his staff simply cannot control its activities. An illustration is a story told about Franklin Roosevelt, one of the most powerful Presidents, who after waking up one morning and looking at the newspaper, purportedly called in an aide and said: "When I woke up this morning, the first thing I saw was a headline in the *New York Times* to the effect that our navy was going to spend two billion dollars on a shipbuilding program. Here I am, the commander in chief of the navy having to read about that for the first time in the press. Do you know what I said to that? I said: 'Jesus Chr-rist!'"[1]

The bureaucratic machine, permeated by a corporate spirit, is successful in defending itself from intrusions by the head of the federal administration. It is in a position not only to blunt or sharpen the impact of domestic or foreign policy decisions made by the President, but in some cases it can mount its own undertakings, relying on the support of its allies and its own resources. This does not mean that the President is powerless before the huge bureaucratic apparatus. With the necessary will and persistence, the President is capable of bringing to its knees any agency or commission—at the cost of enormous effort.

[1] Cited in Michael A. Krasner, Stephen G. Chaberski, D. Kelly Jones, *American Government. Structure and Process*, Macmillan Publishing Co., N. Y., 1977, p. 185.

As with Congress, the federal bureaucracy wields considerable influence on the behavior of the President within the system of checks and balances. In the period of state-monopoly capitalism, the federal bureaucracy as a part of the federal power structure represents mainly the interests of monopoly capital, which often come into conflict with the national interest, represented and defended by the President and Congress in their capacity as the highest organs of the government.

The relationship between the federal bureaucracy and the judicial branch is defined by the following circumstances. Regulations issued by federal agencies may be appealed in the courts. However, decisions by federal agencies may be reviewed in the courts under the Congressional act by which an agency in question was instituted. And Congress may not only establish the grounds for judicial review, but also may exclude the administrative agency being set up from judicial control. If Congress has established a list of grounds for appealing decisions issued by a federal agency, only those complaints that relate to the list may be taken to court.

Finally, federal agencies may perform quasi-judicial functions, thereby encroaching upon the prerogatives of the judicial branch. The federal bureaucracy is thus ensured not only a certain degree of protection from the courts, but also may administer justice within its own structures.

The American *two-party system* is a unique occurrence in politics. For more than a hundred years and at all levels—federal, state and local—the two parties, the Democratic and the Republican, have dominated the American political scene. They have on the one hand been traditional adversaries and on the other represent two halves of a whole, a two-party system or twin parties of big business. A practice of revolving doors was started under the two-party system. Under this practice, which exists today in a somewhat modified form, power changes from hand to hand, but the players remain the same.

The main political parties are paramount in the structure of U.S. politics. During the years of the Reconstruction and after, they breathed new life into the traditional constitutional arrangements, lent a new vitality to the country's most important political institutions and established their monopoly over almost all political life of the nation. It would be practically impossible to imagine the American political system as it exists today without the presence of

the main political parties. And yet, political parties were entirely overlooked by the U.S. Constitution, and their activities, especially at the federal level, were never formalized or regulated by law.

This status of the two-party system is all the more unusual given that the three branches of government rely almost exclusively on the Democratic and Republican parties for recruitment of office-holders.

The main political parties choose and nominate candidates in district and statewide elections to run for the Senate or House of Representatives. The nomination process is almost totally controlled by the party machine. This, of course, does not exclude the possibility that independents or third party candidates can be nominated, but their chances for victory have so far been small. Only the major parties, then, can offer the American voter an "alternative," that is, a choice between two nearly identical candidates, a Republican and a Democrat.

Besides nominating candidates to run for Congress, the major political parties organize, direct and finance their election campaigns. They also play a most important role in Congress and its standing committees, thereby exerting considerable influence on the shaping of legislation.

The U.S. two-party system is in a most direct sense linked with the executive branch, too. The Constitution, which established a number of qualifications required of presidential candidates and set down detailed procedures for presidential elections, remained silent on the question of nominating candidates. Soon after the Constitution came into force political parties filled this void, assuming almost a complete monopoly over the process. In this way the Constitution was considerably complemented.

In addition to nominating candidates for President and Vice-President, the Republican and Democratic parties run the candidates' election campaigns from start to finish, throwing into the campaigns the full force of their powerful party machinery.

The major parties in the United States have much less bearing on the nomination of justices of the Supreme Court and of federal court judges than they do on the recruitment of office-holders in the other two branches. This is because all federal judges are appointed by the President with the advice and consent of the Senate. This involves little if any election procedure. Parties do not nominate candidates for judicial posts, nor do they conduct the usual election campaigns. But they take part in the appointments to federal judgeships through their members in the Senate. The process of filling court vacancies is directly linked to the President's party affiliation and the party balance in the Senate.

The entire gamut of activities carried out by the major parties takes place outside the sphere of constitutional limits and Congressional legislation. To date, only 4 federal laws are on the books that have any bearing on party activities, the most notable of which is the Election Campaign Act of 1974.

Another force operating outside constitutional parameters is *pressure groups*. Set up by private groups and organizations to voice their positions and protect their interests in government and other decision-making agencies, pressure groups can act on their own behalf or join forces with other lobby groups to pursue a common goal. Usually, pressure groups compete against each other for privileges and influence. They vary in their forms and tactics. Lobbyist organizations, for example, represent special interests, while other forms of pressure groups, such as political parties, labor unions, government agencies and the courts, exert pressure in other ways. Even the President, through his assistant for legislative affairs, is involved in lobbying.

It was once written that "lobbying is as natural to our kind of government as breathing is to the human organism, and it is almost equally complex."[1] Lobbying as a way of influencing the decisions of federal agencies has been practised nearly since the inception of the U.S.A. Over this time an extremely complex and diverse system of lobbying techniques has been evolved and applied. American sources usually list various lobbying techniques and assess them according to accepted standards of morality. Pressure groups publish information booklets, buy advertisements in newspapers and radio or television time, and hire lobbyists in order to shape public opinion. Some lobbying techniques are regarded as "respectable" and others as "inappropriate."

Pressure groups and their lobbying bodies send out mass mailings to Congressmen and state legislators, bombard them with telegrams and telephone calls, buttonhole them in the corridors of Congress and state houses, dispatch experts to testify before legislative committees, call on legislators in their offices and at home, mount newspaper campaigns and make appearances on television and radio. Such techniques, considered by most to be respectable, may be used to misinform the public or simply for blackmail. Moreover, it is widely known that lobbyism involves bribery, overt and covert, ranging from donations into candidates' election campaign funds to a simple bribe offered. They may also get the "needed persons" to see their side of the issue by inviting them on pleasure junkets or arranging intimate parties with call girls,

[1] John P. Roche, Leonard W. Levy, *Parties and Pressure Groups*, Harcourt, Brace & World, Inc., N. Y., 1964, p. 195.

which Americans term the "wining-and-dining approach."

These days, the holding of broad public debate on legislative acts and the individual lobbying of legislators require considerable expenditures. Therefore it comes as no surprise that the most effective of all lobbying campaigns are those undertaken by giant corporations and their lobbying arms.

At the federal level, pressure groups focus their activities on the legislative and executive branches. Literature on the subject is most often devoted to the internal and external impact of pressure groups on federal institutions. The chief tactic used to gain influence is the financing of election campaigns of candidates for Congress and the presidency and vice-presidency. By making a contribution into the campaign chest of the winning candidate, pressure groups hope to gain the good graces of that candidate throughout his term in office.

Political contributions buy pressure groups indirect access to various levels of the decision-making process. At the level of Congress, for instance, there are 22 standing committees in the House of Representatives and 16 in the Senate, and a total of more than 200 standing subcommittees. And at the executive level, the President is aided by a full-time staff of more than 5,000 officials. Thousands of lobbyists come into contact with these top-level officials, which cannot help affecting the decision-making process within the two branches. Let us not forget that all these contacts take place among persons of identical social backgrounds, representatives of the middle and upper classes. There is no need to repeat that most top-level positions in the executive and legislative branches are held by representatives of the very same segments of the population.

Very little has been written on how much influence pressure groups have over the courts. In dealing with this issue, we risk venturing into the unknown. The judiciary has painstakingly tried to foster an image of itself as a totally independent branch. Blatant attempts to influence court decisions usually end up attracting unfavorable publicity to the lobbied cause.

A relatively new player in the American political system, one that wields considerable influence on the political decision-making process, is the *mass media*. The media rapidly grew in importance with the development of science and technology. Their roles and importance in the American political system today are defined by the fact that the ruling class uses the media to exert ideological influence upon the whole society. The mass media in turn have much impact on all levels of the political decision-making process.

The press, radio and television have a direct bearing on the election of candidates to public office and on their behavior

once in office. The media play a key role in molding public opinion and guiding voter behavior. They help to shape and publicize the issues around which election campaigns are conducted. They also influence all government institutions, the behavior of political groups within Congress and the state legislatures and the work of government and non-government agencies. It is hard to agree with the opinion of some American political scientists who are inclined to treat the mass media as an independent, "fourth branch" of power. This is an overstatement. By the same token, it would constitute just as grave an error to underestimate the importance of the mass media in the U.S. political system.

The press, the oldest mass media, was born in the United States during the colonial era and for a long time remained the sole instrument of influencing public opinion. Its influence could be compared only to that of the church. Radio and television appeared almost a century and a half after the Constitution had been adopted. In terms of the ideological influence on the public, the mass media could be compared to religion and the church. Both freedom of religion and freedom of the press are among the chief components of American constitutionalism in the area of political rights and freedoms.

The mass media are far from being an obedient and subservient instrument of the major actors in the political process. They possess relative independence owing to the fact that the participants themselves enjoy no unity. They are divided by internal strife, prejudices and rivalry. Amid such circumstances, the mass media have even to a certain extent weakened the ability of the major parties to manipulate the political process.

In general, the mass media's role in respect to the system of checks and balances can be defined as follows. During election campaigns the mass media have an influential hand in the selection of candidates to elected government offices and in the shaping of voter preferences. It is up to the mass media to create the candidate's image and sell it to the voters. The success of a candidate in an election depends largely on how much media access he was able to secure and what kind of image of him was projected by the press, radio and television.

The mass media are involved in the formation of the various bodies within the checks and balances system and have a bearing on their functioning. The following example illustrates this point: "Just a half hour after the Democratic-controlled House of Representatives voted last week to slash Ronald Reagan's requested increases in the defense budget by more than half, the Great Communicator was back doing what he's always done best—selling his own program on nationwide

television."[1] Thus, suffering defeat in the House, the President played his last card—an appeal to the public on nationwide television in a bid to persuade them of the need for a new arms buildup, with allegations of a mounting Soviet threat. Until recently, such tactics had never been tried by a politician of nationwide stature. Today they have become a regular occurrence.

The mass media's involvement in politics has brought major changes to the American political process. In the pretelevision age, politics was practised locally, in front of small gatherings. Today, however, with the advent of television, it is done mainly in the center, in front of nationwide audiences.

The mass media play a considerable role in how the federal institutions, particularly the President and Congress, carry out their functions. The President and Congress operate in a political climate whose day-to-day conditions are determined to a large extent by the media. The media have the power to set the agenda for a national policy debate, declare domestic or foreign "crises" and create "issues" and "problems" on which the attention of Americans and the foreign public becomes focused. They can make or break politicians and public figures and be selective in what they report. In theory, the media are supposed to echo public opinion, but in practice they shape it. Even such a seemingly neutral device as a public opinion poll tends to mold public attitudes rather than record them. Both questions selected for a poll and their wording entail political biases. Likewise, the views of the press, radio and television are not those of the public but those of the powers that be, of the ruling elite. If in certain cases the elite takes into account the opinion of the public, then this opinion is almost certainly that of the news-makers, the owners of the mass media. The relationship between the President and the mass media has become especially active, first with the press, now with television too. The President actively resorts to White House news conference with representatives of the major mass media invited and to appearances on radio and television, during which he attempts to put before the nation the issues that make up his platform. Relations between the President and the media may not always be friendly. It is sufficient to recall Richard M. Nixon's war on the press. And not all Presidents have been willing to use the media as actively as has Ronald Reagan—the Great Communicator.

Relations between the media and Congress are also quite stable, especially since some House and Senate committee sessions began to be broadcast live on television. Most of the major newspapers, magazines, news agencies, and television and radio corporations assign reporters to cover Congressional proceedings.

[1] *Newsweek*, April 4, 1983, p. 14.

Reflecting on the true mechanism of power in American society, Professor Arthur S. Miller writes: "Traditional 'separation of powers' has broken down—irretrievably and completely. The important fact is the web of interactions that enable the 'conventional' Constitution to operate. The historical Constitution remains an honored relic, preserved intact in the National Archives. It is a symbol of the nation, much like the flag. In a secular society such as the United States, it is a substitute for God. The ancient Document is worshipped, and vested with mystery and authority and seeming power that no parchment could ever have. The United States survives today not because of the Constitution but in spite of it."[1]

A number of publications dealing with the separation of powers under modern circumstances carry similar ideas. In them, a search is being conducted for a new system of checks and balances under which the wolves would be content and the sheep remain alive.

American liberal reformers of the system of separation of powers would like to combine incompatibles. They hold the unshakeable view that the executive branch must retain its commanding role over the other two branches to preserve a measure of harmony among them. But they also want the executive to be restrained to such an extent as to preclude democratic caesarism or a plebiscite-established personal dictatorship. They all the time invoke Lord Acton's maxim that power corrupts, absolute power corrupts absolutely. In short, they seek to eliminate the faults in the system within the system itself. The Watergate scandal spurred them on, but so far things have not gone beyond good wishes.

Some have even gone as far as to suggest most extreme changes, all the way up to revising the Constitution and adopting the British cabinet form of government. Belonging to this group is American historian Barbara W. Tuchman, who suggests that "the American presidency has become a greater risk than it is worth. The time has come to seriously consider the substitution of cabinet government or some form of shared executive power... The only way to defuse the presidency and minimize the risk of a knave, a simpleton or a despot, exercising supreme authority without check or consultation is to divide the power and spread the responsibility. Constitutional change is not beyond our capacity."[2]

[1] Arthur S. Miller, *Presidential Power in a Nutshell*, West Publishing Co., St. Paul, Minn., 1977, pp. 322-23.

[2] *International Herald Tribune*, September 24, 1974, p. 4.

Concerning the matter of revising the Constitution, many Americans doubt that the same caliber of minds that were gathered at the Constitutional Convention in Philadelphia 200 years ago could be found today. And as regards the adoption of the Westminster model of democracy with its executive accountability and meticulously structured two-party parliamentary system, the record of both the Labour and the Conservative governments alike puts to rest any such hopes. Many would agree that the American political system is no better and no worse than other Western systems. If this is so, then no foreign model is capable of helping the American system of separation of powers overcome its crisis. The defect of this system lies not in the way it is structured, but in the socio-economic foundation which it serves politically.

American political and legal theory implicitly recognizes that the system of separation of powers as it operates today has departed far from the original model adopted in the late 18th century. Yet this in no way indicates that the original constitutional blueprint has lost all of its force. Political experts often turn to the authority of the Constitution, seeking out the hidden meaning of its tersely worded lines, to defuse the mass of conflicts that arise in the operation of the system of checks and balances.

Many American academics contend that the separation of powers is a political doctrine and not a legal concept. This view is based on the belief that government institutions, although having distinct functions, structures and powers, all pursue the common goals voiced in the Preamble to the Constitution. It also holds that the borders delineating the powers of the different branches of government are variable and fuzzy. From here the conclusion is made that it is meaningless to define the separation of powers as a totality of separate and isolated institutions.

The evolution of the system of checks and balances and the relationship between its components are determined by socio-economic factors. Outwardly, however, the system is defined by two basic competing tendencies. The executive branch seeks to expand its powers, take the initiative on policy issues and concentrate leadership under its roof. As for the legislative branch, what with the numerous independent committees and subcommittees, its real power actually declines, its political initiative is reduced and leadership is spread too thin.

The trickling of power from one constitutional vessel to another, or, in our case, from Congress to the President, has not always been the result of usurpation. In most cases Congress itself has willingly handed over its constitutional powers to the President. In a 1932 case before the Supreme Court,

the majority ruled, "That the legislative power of Congress cannot be delegated is, of course, clear."[1] This ruling, however, was implemented in an odd way. First, it was formulated in a decision upholding the delegation of power in that particular case. Second, the statement was never taken literally, and the Supreme Court itself, as an official commentary to the Constitution points out, "has not felt constrained so much as to bow in the direction of the doctrine."[2]

Both in academic studies and in court decisions the notion is often expressed that any delegation of powers contradicts the very theory of separation of powers. To support this view, they cite John Locke's dictum that "delegata potestas non potest delegari" (delegated power cannot be delegated). Since in theory legislative powers are delegated to Congress by the people, Congress cannot yield them to anyone. American political practice, however, has never been constrained by uncomfortable theories. The policy of the judiciary on this issue has essentially been that of deciding whether or not to allow the delegation of power on a case-by-case basis.

The wide-scale delegation by Congress of its legislative powers to the executive branch, to its numerous structural subdivisions, and the loose interpretation of court rulings on the delegation of power have precipitated the appearance of parliamentary control over administrative acts. The upshot of this is that the executive branch virtually adopts the laws while Congress has the right of veto, often exercised as a one-house veto. It should be added, however, that the Supreme Court declared legislative veto unconstitutional in 1983.

It is worth noting once again that a large part of the President's powers was delegated to him not by the Constitution but by Congressional legislation, much of which was passed without any pressure from the executive branch. As David B. Frohnmayer of the University of Oregon put it, "Congressional power, like chastity, is never lost, rarely taken by force, and almost always given away."[3] Supreme Court decisions have of course played an important role in the setting of legal boundaries to the legislative powers of Congress, yet of decisive importance have always been the actual relations between the branches of government within the system of separation of powers, which are determined by the balance of class forces at a given moment. The expansion of the formal legislative powers of Congress was accompanied by a decline of its actual law-making activity and, as a result, the expansion of the powers of the executive branch.

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[1] United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 85 (1932).

[2] *The Constitution of the United States of America. Analysis and Interpretation*, U.S. Government Printing Office, Washington, 1973, p. 63.

[3] *Oregon Law Review*, Spring 1973, Vol. 52, No. 3, p. 220.

3. THE PRESIDENT AND CONGRESS. PARAMETERS OF RELATIONSHIP

The legislative and executive branches of government possess a considerable number of constitutional, statutory and de facto powers in all areas of law-making and administration of the laws. In most cases, these powers, such as the adoption of laws, the appointment of officials and the conduct of foreign policy, are exercised jointly, which is what the Founding Fathers intended. What are referred to as unilateral powers, i.e., those belonging only to one branch, are not always such in reality, since their exercising is connected in one degree or another with the functioning of another branch. The President's power of veto, for instance, appears to be unilateral, but it cannot be used until Congress passed some kind of legislation, that is, no bill, no veto.

The provision in Section 3 of Article II of the Constitution that the President periodically inform Congress of the state of the Union and make recommendations to this effect became the formal basis for making the occupant of the White House the main architect of federal legislation. This constitutional clause was employed quite widely already by the first President, but its full effect began to be utilized only at the beginning of this century. Today it is clear that the White House has become in effect the initiator and manager of the legislative process taking place within the walls of the Capitol. This does not mean, of course, that Congress is totally obedient to the chief executive, but in the area of law-making, the President is much more dynamic than the law-makers themselves.

The Constitution empowers the President to send messages to Congress. Formally these addresses are intended for information purposes, but in effect they have become a means of presidential legislative initiative, although the Constitution has no provisions on this matter. Moreover, the sole right of Congress to take the initiative in the enactment of legislation is derived from the very spirit of the system of checks and balances within the constitutional framework of the separation of powers. Most students of the U.S. government would more or less agree with the assumption that "the power of the President to send messages to Congress is unmistakable proof that the Founding Fathers expected the President to provide Congress with leadership in the enactment of laws."[1]

Every message of the President to Congress contains not

[1] Robert K. Carr et al., *American Democracy in Theory and Practice*, Rinehart & Company, Inc. Publishers, N. Y., 1959, p. 358.

only an assessment of various domestic or foreign policy situations but also a set of specific recommendations of what steps need to be taken. In most cases the recommendations include a specific legislation program made up of draft bills put together by the relevant federal agencies. A good example is the package of legislation providing for a sharp cut in social programs and an increase in military spending put together by the Republican Administration and approved by Congress early in President Reagan's first term in office.

In American practice there are several types of presidential messages to Congress. The President may either address Congress in person or send it a message in writing. The State of the Union Address is made to Congress at the beginning of each session. In the age of broad news coverage of political events, the State of the Union Address affords the President the opportunity to address the entire nation. Because of the large audiences attracted by the yearly addresses, both at home and abroad, the President's domestic and foreign policy pronouncements often project a rosy picture of affairs and nearly as often contain a fair dose of political demagoguery. In general, the President sends Congress numerous messages on a wide range of subjects. Many of these in addition to immediate recommendations contain a list of legislation planned for the future.

From a purely legal point of view, messages by the President carry only an advisory capacity and do not bind Congress to take any action. In practice, however, their regulatory effect is enormous. Naturally, not all the legislative proposals of the executive branch are adopted, and those that are adopted are not always done so in the same form in which they were proposed. A host of factors affect the chances of whether or not the President's recommendations will be adopted, including the personality of the President, the party balance in Congress, and the perseverance and talents of the President's Congressional liaison aides. But on balance there is every reason to state that the President enjoys relative success in getting his legislative proposals through Congress, reinforcing his position as the nation's chief law-maker.

Significantly strengthening the President's hand in law-making is the *power of the executive branch to veto* bills passed by Congress. This power, although nowhere explicitly provided for in the Constitution, is inferred from Section 7 of Article I, which states: "2. Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider

it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two-thirds of that House it shall become a law... If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return; in which case it shall not be a law.

"3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or being disapproved by him shall be repassed by two-thirds of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill."

This section of the Constitution was designed to ensure, first, that the presidential veto applied to all bills and also to all resolutions passed jointly by both houses of Congress and, second, that a two-thirds vote by both houses would be required to overturn a veto by the President, thus making it much harder to overrule the President than to pass ordinary bills. It also stipulated that the President could reject or approve a bill only as a whole, and that he had only ten working days in which to do so. In the event that the allotted time is interrupted by the adjournment or postponement of the legislative session, all bills and joint resolutions not signed by the President are considered to be vetoed by him.

The President, should he reject any part of a bill or a joint resolution, returns it to the house from which it originated together with a list of his objections and an explanation of them. One of three possibilities may follow. By a two-thirds vote in both houses the rejected bill may be passed over the President's veto and enacted into law. Or the bill may fail to gather the required votes and be permanently blocked, unless it is reintroduced by one of the houses. A third possibility is that Congress accepts the President's objections and includes them in a new bill, which is then signed into law by the President.

An entirely different case arises when the ten-day period allotted the President is interrupted by the adjournment of Congress or the postponement of a session, and the bill is intentionally not signed by the President. In such situations the bill is considered dead, the President having exercised what is called "pocket veto." Congress is unable to override a pocket veto since no procedures have been envisioned for this. Strictly constitutionally, the President's basic veto

implies deferment. But in the case of the ten-day period interrupted, the possibility that the bill might be returned to Congress thus prevented, the President's inaction has the same effect as an absolute veto.

An important fact relative to the use of the veto is that the President can approve or reject a bill only as a whole, and not piecemeal. This makes the veto a cumbersome weapon incapable of being used tactically. Each time the President considers a bill he is faced with the dilemma of either all or nothing. In military terms, the veto is akin to a strategic weapon that can destroy entire cities but is incapable of taking out separate buildings or blocks.

By contrast, Governors in 42 states may resort to "item veto," rejecting certain items or sections selectively. Of course, item veto is a more flexible lever for the executive branch to affect legislation.

Under certain circumstances, the use of the veto can produce undesired results for the President. Congress, for example, widely employs a device that is known in political jargon as a "rider." Under this tactic, entirely unrelated provisions are attached onto bills proposed by the President as they pass through Congress. The riders are attached with the knowledge that they would never stand a chance of making it past the President were they to be considered separately. The upshot is that the President must either sign his own bill with the attached and so much despised rider or kill them both. The latter option is rarely exercised.

Notwithstanding all the drawbacks to the President of using the veto, its potential effect is quite large because of the immense difficulties involved in overriding a presidential veto by a Congress notorious for the low party loyalties of its members. "The veto power is a major weapon of the President as chief legislator... Indeed, only about 3 per cent of Presidential vetoes have been overriden by Congress."[1] In many cases the President can put pressure on law-makers merely by threatening a veto: "If a President allows congressional leaders to believe that he will veto a particular measure if it is presented to him in the form contemplated, he may be able to achieve changes before final passage and thus influence the final form of the measure. By indicating that he will veto a given measure in any form, he may be able to preven its passage and even its introduction."[2]

Besides his veto power, the President pursues various other

[1] Michael A. Krasner et al., *American Government. Structure and Process*, p. 30.

[2] William H. Young, *Ogg and Ray's Introduction to American Government. The National Government*, Appleton-Century-Crofts, N. Y., 1962, p. 327.

tactics to bring pressure on Congress, including through such official channels as his Congressional liaison staff and through such unofficial ones as meeting with House and Senate leaders and committee chairmen, using patronage, writing personal letters, and appealing to party loyalty. This combined with the veto power and the extra-constitutional right of legislative initiative, the President possesses a mighty arsenal of levers for putting pressure on Congress.

Section 7 of Article I of the U.S. Constitution prescribes the conditions and procedures for the enactment of all orders, resolutions, or votes to which the concurrence of the Senate and the House of Representatives may be necessary. This includes all acts that are passed by both houses in the course of carrying out their legislative functions and that have a bearing on law. Such acts are called joint resolutions and are equal in status to a bill. If passed by Congress and approved by the President joint resolutions take on the force of a statute.

Both houses of Congress can also jointly pass concurrent resolutions which unlike joint resolutions do not require presidential approval. They are declarative in nature and merely express the opinions of the bodies on a certain matter or proclaim a shared program of action in a particular area. In the 1930s, the practice of passing concurrent resolutions took a most unexpected and, for the executive branch, in many ways unpleasant turn: these resolutions (not requiring presidential approval) began to contain dictates to the President or cabinet members on the cancellation of regulations issued by the Administration or on the repeal of powers delegated to them earlier. Thus was introduced into American political practice the so-called *legislative veto* imposed by Congress on federal administrative regulations.

The right of legislative veto was each time established in a particular act passed by Congress, and the length of time for its application and those entitled to it were specified. The War Powers Resolution of 1973, for example, states that, unless war is formally declared, if the President sends U.S. troops to fight in a foreign country, Congress may by a concurrent resolution order that the troops be brought back home. According to the 1974 Budget and Impoundment Control Act, requests by the President for an extension of the federal debt limit may be rejected by a resolution of either house. And under the 1982 Defense Department Appropriation Act, any cost overruns on purchases of military equipment must be approved by the House and Senate Armed Services Committees.

Similar types of restrictions have been attached to almost

200 bills passed by Congress, most of which leave Congress in the form of resolutions passed by one or both houses and are enacted into law without the signature of the President.

Legislation providing for a legislative veto has been increasing in frequency as more law-making powers have been delegated by Congress. For instance, between 1932 and 1939, 5 such statutes were passed. Between 1940 and 1949 there were 19, between 1950 and 1959—34, between 1960 and 1969—49, and between 1970 and 1975—89. In the first two and a half years of the Reagan Administration more than 30 such statutes were enacted by Congress.

Laws containing legislative veto provisions are not only passed, but also applied, and quite effectively. The legislative veto has gradually become a rather intimidating weapon in the hands of legislators and has begun to irk the executive branch. The Administration is particularly irritated at the possibility that the legislative veto can be used on foreign policy decisions, an area over which the President and the State Department have traditionally had a monopoly. The legislative veto was first applied to a foreign policy decision of the Administration in the early 1970s. In 1973, amid a caustic confrontation between President Nixon and Congress, emerged the War Powers Resolution, and in 1976, Congress voted itself the right to impose a legislative veto on the sale to foreign states of military equipment and heavy arms and the offering of military assistance.

The increased frequency with which Congress relied on the legislative veto was the reaction to the scandalous abuses by the federal administration that were uncovered in the early half of the 1970s. The public were also concerned about the increase in the administrative law-making by federal agencies.

Constant political friction between the executive and the legislative branches made it only inevitable that the Supreme Court should be asked to decide whether the legislative veto was constitutionally warranted. Given this chance, the conservative Court wasted no time in proclaiming its judgement: on June 23, 1983, the Supreme Court announced that the legislative veto was unconstitutional. Although the decision came in a run-of-the-mill case involving the deportation of illegal immigrants (*Immigration and Naturalization Service v. Chadha*), its political implications were immediately evident, causing a stir among the public, the media, the Administration and Congress. In one stroke the Court had nullified the provisions of nearly 200 statutes that contained the legislative veto indications. An influential U.S. weekly reported that the Supreme Court's sweeping ruling "touched off a fierce power struggle between Congress and the White House that

is likely to rage for years to come."[1] It should be noted that the Supreme Court declared unconstitutional only one-house vetoes, leaving for legal scholars and politicians to guess whether this ruling applied also to joint resolutions of Congress. Congress nonetheless sharply reacted to curtailment of its actual powers, and at present law-makers are pondering new ways to assert their control over the Administration's law-making abilities without resort to the legislative veto. Whether such measures can be adopted in practice and how effective they can be depends upon the domestic political situation. But what is clear is that the striking down of the legislative veto, depriving Congress of a powerful check on the Administration, reflected a general tendency of the American system of government toward the strengthening of the executive branch.

Of course, the 1983 ruling did not leave Congress entirely powerless in relation to the executive branch. It can rely on its *investigatory power*, an important element of its implied powers though not specified directly in the Constitution. As one scholar noted , "The role of Congress as grand inquisitor is almost as old as the nation. It has had a long and checkered career. One will look in vain in the text of the Constitution, however detailed Article I may seem to be, for the source of this power and function... the constitutional authority at issue—here the power of legislative inquiry—cannot be evoked from the words of the Constitution itself. We cannot impose paternity on the Founding Fathers. Necessity was probably its mother. But its legitimacy is long past question."[2]

Although in the Constitution the investigative powers of the legislative branch are nowhere mentioned, even back in the colonial times the legislative assemblies possessed such powers in one degree or another. The power of legislative inquiry was borrowed from British parliamentary practice. The seeds brought from across the ocean fell on fertile soil in the New World.

Congress' power of inquiry has been upheld by the Supreme Court in a number of cases. In these rulings the notion was developed that without the power of inquiry, Congress would be unable to duly exercise its constitutional rights and duties. Without access to sufficient information, opined the justices, it is impossible to enact or repeal laws, appropriate money, approve presidential appointments, ratify treaties,

[1] *U.S. News & World Report*, July 4, 1983, p. 14.
[2] Philip B. Kurland, *Watergate and the Constitution*, University of Chicago Press, Chicago, 1978, pp. 17, 18.

etc. "If Congress could not investigate the executive branch, it could not keep the public informed about the state of its government. In short, without its powers of oversight, Congress would be emasculated."[1]

In the eyes of the judiciary, the right of Congress to investigate and control the actions of the Administration is implied by the Constitution and is therefore constitutional. In addition, this right has been affirmed in federal statutes.

Legislative inquiry is exercised in varying degrees by the standing committees of the House of Representatives and the Senate, and also by numerous subcommittees created by the standing committees. These functions are performed to a certain extent by the General Accounting Office, an arm of the legislative branch. Congress may ask the GAO to conduct an investigation into the financial activities of federal agencies.

Inquiries launched by Congressional committees and subcommittees can be quite effective. It is sufficient to recall the performance of the Senate Select Committee on Presidential Campaign Activities headed by Senator Sam Ervin, which investigated the Watergate scandal, and the activities of the House Judiciary Committee, which began impeachment proceedings against President Richard Nixon. In the mid-1970s special House and Senate committees began inquiries into the activities of the Federal Bureau of Investigation, the Central Intelligence Agency, the Military Intelligence Office and the National Security Agency, revealing shocking evidence of breaches of law by these secret services.

A number of circumstances need to be examined before we can realistically gauge the significance of Congress' power of inquiry.

First, the human resources available to Congress for the conducting of inquiries are quite limited. A total of 535 Congressmen and Senators, another 2,000 or so technical experts and advisors and a rather limited staff. They must face a gigantic federal bureaucracy with over 5 million civilian and military employees. In the age of advanced technology federal agencies are highly specialized. But even when a member of a committee of inquiry possesses special knowledge, it is of little help since agency experts will be able always to stay a step ahead of him. It has been noted that each time a Congressman attempts to meddle in such touchy subjects as the production of nuclear weaponry, he risks making a fool of himself.

A shortage of personnel, the difficulties encountered in gaining access to information, and the limited availability of

[1] James Hamilton, *The Power to Probe. A Study of Congressional Investigations*, Vintage Books, N. Y., 1977, p. 161.

experts in key fields reduce the effectiveness of Congress in using its powers of inquiry. The federal bureaucracy resorts to various methods to fend off requests by Congressional committees for information. Everyday red tape works excellently. Often the federal bureaucracy furnishes Congress with distorted or simply falsified information.

Second, it should be noted that the investigative powers of Congress are a two-edged sword. They can be used with equal effectiveness for combating abuses of the Administration and for harassing political undesirables. American history is filled with shameful chapters describing the political witchhunts that were conducted by the House Un-American Activities Committee and the Subcommittee on Investigations of the Senate Government Operations Committee under the chairmanship of Sen. Joseph McCarthy. Sen. Ervin wrote in this regard: "A legislative inquiry can serve as the tool to pry open the barriers that hide governmental corruption. It can be the catalyst that spurs Congress and the public to support vital reforms in our nation's laws. Or it can debase our principles, invade the privacy of our citizens, and afford a platform for demagogues and the rankest partisans."[1]

Third, any investigation of an arm of the executive branch entails great difficulties, since the federal departments and agencies may claim executive privilege—a prerogative shielding them from an overzealous Congress whose boundaries remain rather fuzzy. An endless number of top officials ranging from the President and heads of executive departments to their aides and advisors may invoke executive privilege to try to stave off a Congressional inquiry.

The notion of *executive privilege* assumed special significance during the Watergate period, when it drew the attention of scholars and columnists as well as politicians and statesmen. Even today, however, no consensus has yet taken shape on what exactly executive privilege covers. Professor Laurence H. Tribe, a leading expert on constitutional law, began a chapter of a monograph on the subject with the following: "Executive privilege is mentioned neither in the Constitution nor in the constitutional debates. That fact notwithstanding, Presidents have often invoked such a privilege when, for better reasons or worse, they wished to don the shroud of secrecy."[2]

Until recently this term was mentioned neither in major studies nor in political or legal dictionaries. However, the notion of executive privilege has now become widely accepted and is closely linked with the concept of separation of powers.

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[1] James Hamilton, *The Power to Probe...*, p. XII.

[2] Laurence H. Tribe, *American Constitutional Law*, The Foundation Press, Inc., N. Y., 1978, p. 202.

As it is most often interpreted, executive privilege refers to the right of the President to withhold information that in his opinion is confidential. The adherents of this right argue that it is justified by national security considerations and that it is among the implied powers granted to the executive branch by the Constitution.

Over the course of American history many Presidents have assumed that the Chief Executive had the right to do anything dictated by what they regarded as the "interests of the nation," provided that their actions were not expressly prohibited by the Constitution or law. The executive privilege was shaped and asserted by Presidents themselves.

Most would allow that executive privilege may be invoked in two areas. The first concerns the President's right of confidentiality, according to which he may refuse a request by Congress, or, more exactly, a Congressional committee, for information or documents on the processes by which the executive branch arrived at a decision. This refers mainly to the President's carrying out of his role as commander-in-chief of the armed forces and as leader of foreign policy, for it is primarily in these areas that confidentiality is closely connected with national security. This usually implies private meetings and discussions of the President with his aides and advisors. Second, employees of the executive branch, in particular, of the White House staff, cannot be ordered to testify before Congressional committees on the internal relationship within the office of the Chief Executive. Executive privilege, however, goes against the right of the legislative and judicial branches to seek information on the workings of the executive branch. When these openly opposed claims clash, heated conflicts arise which directly affect the functioning of the system of checks and balances.

From time to time the legality of the implied powers of the President becomes the focus of fiery debate and political confrontations. President Nixon, invoking the provision of executive privilege protecting the confidentiality of conversations between him and his aides, refused to turn over to the courts and Congressional investigators tapes of his conversations with his inner circle. Nixon's categorical refusal, derived from the implied powers of the presidency, sparked an acerbic conflict between the President and Congress that spilled over to involve the Supreme Court. In 1974, in *United States v. Nixon*, the Supreme Court ruled that executive privilege did not extend to materials that could serve as evidence in a criminal case, but stopped short of overturning the principle of executive privilege completely. According to the Court, "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." From a tactical stand-

point the ruling severely undercut President Nixon's position (he was forced to resign), but preserved for American Presidents the strategic possibility of expanding their authority on the basis of implied powers. This was because the Supreme Court, among other things, left intact the idea of executive privilege.

The potentially most powerful weapon, though rarely used, that Congress possesses for keeping the executive branch in check is *impeachment*. This is the procedure by which top-level government officials are called to account for abuse of office or criminal offenses. Rooted in the British parliamentary practice, impeachment proceedings are conducted by the legislative branch and may result in the removal from office of an official found guilty. Section 4 of Article II of the Constitution defines the officials who may be subject to impeachment: "the President, Vice-President, and all civil Officers of the United States," which means all federal department and agency officials. Accordingly, military officials are not subject to impeachment. Also excluded are Senators and Congressmen, whose crimes and misdemeanors are investigated by the respective houses.

Impeachment proceedings can be likened to a trial in which the House of Representatives acts as the prosecutor and the Senate as the court. However, the similarity is only formal. In essence, impeachment is more like a political process whose purpose is to remove federal officers from office. It starts with the introduction by a Congressman of a resolution charging an official with an offense. The resolution is then sent either to the House Judiciary Committee or to a special committee, which determine whether the charge has sufficient grounds and formulate the articles of impeachment, which can be likened to an indictment. The articles of impeachment as formulated by the committee are then studied by the entire House of Representatives. If approved by a simple majority of the House, the articles are passed to the Senate where action on them will be initiated.

The Senate cannot sidetrack the articles of impeachment sent up by the House but must act on them in its capacity as "the high court of impeachment." The procedures followed by the Senate in considering the articles of impeachment on the whole differ little from those observed by a regular court. After examining evidence, questioning witnesses and hearing the testimony of the sides, the Senate on a secret vote decides the question of guilt. The consent of two-thirds of the Senators present is necessary for passing the verdict guilty.

Only 12 times in American history have impeachment proceedings initiated in the House of Representatives reached the Senate, and in only 4 of these cases verdict was guilty. At issue here is a verdict and not a sentence in the strictly legal sense of the word, since if the Senate finds the person under indictment guilty, the sole form of punishment it can mete out is removal from office and the barring from holding "any Office of honor, Trust or Profit under the United States," which in effect means any position within the federal government.

The Constitution provides that a person found guilty in the course of impeachment is nevertheless liable and subject to criminal prosecution according to law. Here again is revealed the specific nature of impeachment. Under the double jeopardy principle of criminal law, no person may be punished twice for the same offense. But in case of impeachment, this provision does not apply. A person found guilty by the Senate in an impeachment process is subject to criminal charges on general grounds and may be found guilty and punished for a second time by a court of law.

Neither constitutional theory nor judicial practice has yet decided conclusively the question of what grounds are necessary to indict a federal officer under the provisions of impeachment. The Constitution lists as impeachable offenses treason, bribery and "other high crimes and misdemeanors." Yet of these, the Constitution defines grounds only for treason. The concept of bribery is quite precise, and the actions that constitute this offense are defined by both statutory and common law.

A much more difficult problem is presented by how to interpret the constitutional expression "other high crimes and misdemeanors." Neither judicial practice nor constitutional law doctrines have yet provided a proper, concrete interpretation of this phrase, which was borrowed from British legal practice.

In American criminal law, a misdemeanor is any minor offense that is punishable by imprisonment for up to one year. More serious crimes, for which may be invoked the death penalty or imprisonment for more than one year, are defined as felonies.

No clue is provided as to what is meant by "high crimes," but more than likely these are something similar to felony, or at least include it.

The Framers of the Constitution in all probability intended the phrase "other high crimes and misdemeanors" to mean any offenses that were considered by British common law to be especially serious, such as embezzlement of public funds by public officers, abuse of powers, negligence of duties, political corruption, encroachment on legislative prerogatives and contempt of the legislature.

The adjective "high" in this phrase applies both to "crimes" and to "misdemeanors." Under criminal law, the distinction makes little difference, and in British impeachment practice, the modifier was used to afford the phrase a more solemn air. The predominant view in U.S. constitutional law is that grounds for impeachment should not be limited to criminally punishable offenses: there may be situations where impeachment can be invoked for acts that in themselves do not constitute a crime. Many American legal experts lean toward the opinion that any action by the President that undermines trust in the federal government may serve as grounds for impeachment. They also regard as grounds for impeachment incompetency, bad rule and inadequate morals, citing as precedent the case of a federal judge who was impeached for systematic drunkenness.

Only twice in U.S. history have impeachment proceedings been set in motion against a President. In 1867 they were instituted against Andrew Johnson on the charges of trying to fire the Secretary of War, Edwin Stanton, in violation of provisions of the Tenure of Office Act of 1867 (the Act was later struck down as unconstitutional). The Senate failed to convict Johnson by a margin of one vote.

Already then it was considered that offenses other than criminal could serve as grounds for impeachment. Wrote John Bingham, the leader of the impeachment move against Johnson, in 1868: "An impeachable high crime or misdemeanor is one of its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[1]

The reference here is not to ordinary crimes, such as felonies or misdemeanors, prosecuted in the courts of law, but to special offenses involving violation of the Constitution or otherwise encroaching upon constitutional government, as cited above. Of special interest is the last part of the quotation where mention is made of acts not violating "a positive law," that is, moral breaches.

For shedding light on the question of what grounds are necessary for impeachment it is worthwhile to turn our attention to the articles of impeachment drafted to be brought against President Nixon by the House Judiciary Committee in July 1974.

The Committee concluded that "in his conduct of the office of President of the United States, Richard M. Nixon, in viola-

[1] Laurence H. Tribe, *American Constitutional Law*, pp. 217-18.

tion of his constitutional oath faithfully to execute the office of President of the United States ... and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice... Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal, and protect those responsible..."[1]

The record of past practices indicates that grounds for impeachment may be not only criminal offenses but as well actions by the President which in themselves do not violate criminal law, such as serious omissions in official duties, the violation of moral standards and other offenses undermining the authority of the government and public trust in it. In determining the grounds for impeachment in a specific case, much depends on the political situation at the time, the balance of party and group forces in the House of Representatives and the Senate, and many other factors not easily predictable. Much is left to the discretion of Congress. Gerald Ford, while still a member of Congress, asked, "What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history."[2]

Until the Watergate scandal, impeachment was considered a latent prerogative of Congress having little practical significance. Before then, impeachment charges had been brought mainly against federal judges. Yet this should not be interpreted as implying that impeachment is no more than an abstract threat that Congress would be hesitant to resort to. In a critical situation, the threat of impeachment could be employed by Congress for influencing the White House. Like the presidential veto, impeachment is a strategic weapon and not a tactical one. It compels the President and other high-ranking officers who are potentially subject to impeachment to check once in a while their official behavior with the doctrinal criteria of impeachable offenses.

The question of *appointment of federal officers* is very important to an appraisal of how the system of checks and balances operates. The Constitution provides for the appointment of officers to two types of offices: the higher offices

[1] Philip B. Kurland, *Watergate and the Constitution*, pp. 119-20.

[2] *Congressional Record*, Washington, April 15, 1970, Vol. 116, No. 60, p. H 31313.

directly mentioned in the Constitution, and those established by Congress. Appointments to high offices are to be made jointly by the President and the Senate.

The procedure established for appointing federal officers has two stages. First the President chooses a candidate and offers him or her to the Senate for approval. After holding hearings on the nominee, the Senate votes on whether to approve the appointment, with two-thirds necessary for approval. Lower officers, whose jobs are created by an act of Congress, are appointed by the President, heads of departments or agencies or by courts without the advice and consent of the Senate.

Among the appointments the Constitution mentions as subject to the approval by the Senate are those of ambassadors, consuls and other envoys, Supreme Court justices, and other officers within the executive and judicial branches. These offices are considered to be "high" for the simple reason that the Constitution requires Senate approval of appointments to them.

The presidential right to appoint federal judges and justices of the Supreme Court is of great importance to an appraisal of the possible influence of the executive branch on the independent judiciary. Life-time appointments allow Presidents to influence the policy of the judiciary for many years, which is why every Administration carefully screens candidates to fill vacancies.

The division of federal officers into "high" or "senior" and "junior" thus derives from the different procedures by which they are appointed. This is not always a reliable indicator of the officer's real status within the government. In general, "junior" officers are those who hold their offices within the merit system established by civil service legislation. The merit system covers all offices, including upper-level, in independent agencies and other important federal departments. It is worth noting, however, that independent agencies play an enormous role in the functioning of government and the regulation of society. The list of such agencies, which number more than 50, includes such powerful institutions as the Federal Trade Commission, the Export-Import Bank, the Environmental Protection Agency, the Federal Communications Commission and the National Labor Relations Board. Independent agencies were invested with an unusual mix of powers ranging from executive and regulatory to quasi-judicial. By contrast, a considerable proportion of federal postmaster generals must be appointed with the advice and consent of the Senate, which formally makes them "high" officials.

The top level of the Administration, made up of civilians appointed by the President with the advice and consent of

the Senate, is made up of department heads, ambassadors and other senior diplomatic officials, presidential assistants and advisors, and other senior personnel in the Executive Office of the President and outside it. These officials are the ones who comprise the President's "team," who are recruited on the basis of various factors such as political loyalty to the President, political experience, shared ideology, professionalism, personal friendship and, not infrequently, ordinary nepotism.

The Founding Fathers deemed it necessary to fix in the Constitution procedures for receiving Senate approval of presidential appointments in order to preclude the possibility of favoritism based on personal, family, or geographic considerations. Senate involvement in the appointment of federal officers failed, however, to exclude the possibility of favoritism owing to the evolvement of a ritual in which the Senate came to play almost a symbolic role. The record that emerges is one of virtually automatic Senate approval of presidential appointment to top-level positions within the executive branch of government.

Theory and practice do not diverge on the fact that the President can at will fill the official vacancies around him.

There sometimes are exceptions to this general rule, especially in times of split government when relations between the President and Congress become strained. All told, though, the Senate rarely rejects a nominee submitted by the President for approval.

An original feature of American political life is so-called senatorial courtesy. According to the *Dictionary of American Politics*, senatorial courtesy is "a tradition and practice in the United States Senate of not approving any presidential appointment which directly affects a state when the senator or senators of this state who belong to the majority party object to the appointment. This applies most frequently to appointments such as local postmasters and district attorneys, and also to the appointment of federal judges in the respective states."[1]

The issue here concerns the several score thousand positions within the so-called field service which are minor in comparison with political appointments within the Administration but which nevertheless must be made with Senate approval. These positions are filled on a patronage basis, a system under which loyal party workers are rewarded by the party in power. Every Senator is interested in rewarding his supporters within his state for services rendered in order to insure his re-election. Patronage appointments in a state

[1] Eugene J. McCarthy, *Dictionary of American Politics*, The Macmillan Company, N. Y., 1968, p. 143.

are made in effect only with the approval of the Senator or Senators of that state that are of the same party as the President. Approval by the necessary Senate two-thirds vote is given only to those candidates who have the blessing of their home state Senator. In general, local appointments are the domain of the Senator or Senators whose home state is affected, not of the President.

The President has almost total freedom in appointing members of his team, but as far as other appointments are concerned, he must heed the opinion of members of his party in the Senate and House and also that of state party committees. Senatorial courtesy and patronage offer the opportunity for deals to be made between the White House and Capitol Hill. Using such methods the Chief Executive can secure support in Congress for his legislative programs.

Much more complex from a practical and theoretical standpoint is the question concerning the procedures for removing an official from office, that is, the extent of presidential powers to fire a top federal officer. This question more than once has been the cause of antagonism between the executive and legislative branches. Matters are not helped much by the fact that the Constitution contains only one reference to the procedures and grounds for removal of a civilian from a high federal position—tucked inside the provisions for impeachment. Since the impeachment provisions are resorted to only rarely and concern only the President, Vice-President, and federal judges, the Constitution in effect left the early removal from office of a federal officer an open question. Even in theory, the impeachment provisions could not be applied universally to the removal of federal officers. It would hardly cross someone's mind that the chief judge of a federal district court would need the "advice and consent" of the Senate to fire a lowly clerk.

In the first 80 years after the Constitution was adopted Congress was reluctant to interfere with the President's license to remove from office employees of the executive branch as he saw fit. This laissez-faire approach was ended in 1867 with the adoption of the Tenure of Office Act, which barred the President from firing cabinet members (appointed "with the advice and consent" of the Senate) without the consent of the Senate. This act remained on the books only until 1887, and another 40 years later, the Supreme Court ruled it unconstitutional along with several other laws on the early removal of federal officials. In *Myers v. United States*, the Supreme Court ruled that the right to remove from office employees of the executive branch was inseparable from the right to appoint them, and therefore the President possessed the exclusive right to remove officers from executive departments of the United States whom he appoint-

ed with the advice and consent of the Senate. Many American students of the Constitution, however, feel that in the *Myers* case the Supreme Court went too far in that it gave the right to remove federal officers wholly and completely to the Chief Executive.

In 1935 in its ruling on *Humphrey's Executor v. United States*, the Supreme Court significantly limited the President's power to remove federal officers. It stated that the President's right extended only to federal employees of clearly "executive" agencies, in other words, the executive departments under the President. This meant the President could not fire officers of independent agencies created by Congress, unless Congress were to invest him with that power by statute.

Current procedures for the removal of federal officers are defined by a 1935 Supreme Court ruling which states that the President can fire employees of independent federal agencies only with the consent of Congress, unless otherwise stated by law, but can remove cabinet members, other federal officers and members of his personal staff at his own discretion. Such procedures appear to be at variance with the provision of the Constitution relative to the appointment of officers—those who are appointed "with the advice and consent" of the Senate can be removed from office without its consent, and those who are appointed without Senate approval can be removed only with the sanction of Congress.

It appears here that political considerations outweighed constitutional: the right of the President to remove top administration officers at his discretion extends to those who are already a part of his team as a result of his own choice. Therefore, given the political need, they can be removed from the team at the President's discretion. The realization by the President of the right to remove top-level officers often assumes dramatic forms, and sometimes precipitates a political scandal. Thus, in 1973, when Watergate Special Prosecutor Archibald Cox demanded that the White House hand over tapes of President Nixon's conversations in order to determine their value as evidence, the President instructed Attorney General Elliot Richardson to fire Cox. Richardson refused to obey and resigned. Nixon dismissed Richardson's deputy, who also refused to carry out the order, and then proceeded to fire Cox and his team of special prosecutors in a rash of sudden dismissals that became known as the "Saturday night massacre." The President's actions drew sharp disapproval of the public and Congress and sparked the first calls for his impeachment.

U.S. politics is able to provide other examples of a President's headlong action in the removal of top-level officials. In 1975, for example, President Gerald Ford fired Secretary

of Defense James Schlesinger without giving advance warning or making public the reasons for his decision, leaving Schlesinger, a well-known politician, in an awkward position. Ronald Reagan felt no pangs of conscience when in the summer of 1982 he forced the resignation of Secretary of State Alexander Haig, who had disagreed with some of his aides over policy matters. Often Presidents reshuffle cabinet members to create the impression of a new direction in their administration when certain aspects of it have been criticized by the public. In such cases the right of the President to fire at will members of his team serves as a weapon for political maneuvering, and the officials who are driven out of office but who still remain loyal to the party see themselves as involuntary political victims.

Relations between the legislative and executive branches on matters of the budget are in their present form utterly complex, entangled and conflict-ridden. They concern directly a vast array of agencies, institutions, departments, public organizations and private citizens. At stake is a share of the hundreds of billions of dollars the federal government spends on various needs ranging from missile systems to environmental protection. This also includes taxation and other sources of federal revenue. In short, in the era of state-monopoly capitalism, the significance of financial relations is utterly incomparable with the moderate import attached to them in the late 18th century. This explains why the Constitution says so remarkably little on the subject.

In the constitutional arrangement of the separation of powers the relationship between the President and Congress is defined only in the most fragmentary way, and nothing at all is said of the Supreme Court's role in this field.

Congressional powers over financial matters are defined mainly by Section 8 of Article I of the Constitution, wherein are listed the areas within Congress jurisdiction. The Constitution vests Congress with the right to lay and collect taxes, duties, imposts and excises, which must be uniform throughout the United States. The rule of uniformity extends only to indirect taxes, as direct taxes are imposed in conformity with the law of proportionality.

The Constitution also grants Congress the right to borrow money on the credit of the United States. This means that in borrowing money, Congress imposes on the United States in the person of its highest government bodies an obligation that must be strictly observed to repay debts on the terms agreed upon, and cannot subsequently change the terms of the agreement unilaterally. Congress is also empowered to raise and support armies and provide and maintain a navy.

Section 9 of Article I imposes several restrictions on the spending of government money. It establishes that "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

This provision restricted the authority of the executive branch, but not of the legislative branch, which could order any expenditure from the Treasury by passing appropriations bills.

Also concerned with the financial powers of Congress is Section 7 of Article I, which states that "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills."

The Constitution makes no direct reference to the fiscal powers of the President, nor does it mention any presidential initiative in financial matters. What's more, no reference whatever is made to the relationship of the President and Congress on financial matters. All the powers the President currently holds in the financial field are either derived implicitly from constitutional provisions or have been delegated to him by Congress. In defining the implied powers of the President in fiscal matters, as in many others, a number of constitutional provisions were interpreted quite broadly.

The Founding Fathers sought to lay all powers concerning the government purse in the hands of the legislators. Yet from the first days of the American Republic an entirely different practice took shape. The Department of the Treasury was created in 1789, which as an arm of the executive branch began not only to formulate recommendations on financial policies but also to administer laws in this field.

For over 100 years, however, the executive branch's budgetary activities were unsystematic and chaotic. Cabinet-level departments and agencies compiled their budget requests independently of each other, without proper coordination, after which they were often mechanically compressed into one and thus presented to Congress. Conflicts on budgetary matters frequently arose between the White House and Capitol Hill, provoking law-makers to question the constitutionality of the President's budget powers and his responsibilities in this area.

In 1921 Congress passed, and President Warren G. Harding signed, the Budget and Accounting Act, which created the Bureau of the Budget, under the Treasury Department until 1939, when it became part of the Executive Office of the President. The Budget Bureau was to be headed by a director appointed by the President. Under the Act, all

budget requests of federal agencies that previously were sent to the Treasury Department for their subsequent presentation to Congress, were now to be sent to the Bureau of the Budget. It was the Bureau's job to review the requests and hold hearings on them in order to eliminate needless duplication and unjustified spending of government funds. The Bureau's main task was to bring all spending requests in line with the President's political priorities. The draft prepared by the Budget Bureau was first sent to the President for his approval before it was presented to Congress.

The enactment of the Budget and Accounting Act far from meant that Congress had been totally dispossessed of its right to control the financial activities of the Administration. Rather, the opposite was true, since now instead of chaotic and doubtful information Congress began to receive systematized data already in line with the President's policies. Congress continued to review the budget proposals of the White House, cutting or increasing the spending requests of various federal agencies as proposed by the Administration.

The centralization of budget-making activities within the executive branch brought about corresponding changes in Congress. The review of spending bills in the House of Representatives was focused in one committee and its subcommittees, and similar structural reforms were carried out in the Senate.

The Budget and Accounting Act of 1921 also created an entirely new agency within the legislative branch, the General Accounting Office, to be headed by the Comptroller General of the United States. The G.A.O. was established to provide Congress with financial information and expertise and also to coordinate the budgetary activities of Congressional committees and commissions with those of federal financial institutions and other executive agencies.

The introduction of an executive branch budget did not signify that chaos and confusion had been completely eliminated from the budgetary process, although after 1921 the federal government's budget activities became indisputably more ordered and better substantiated. The new conditions of the post-World War II years, which saw rapid advances in science and technology and a new upsurge in federal spending, prompted the need for both branches of power to improve their control over the federal budget and spending practices.

In 1970, in one in a series of attempts to streamline the budget-making process, the Administration transformed the Bureau of the Budget into the Office of Management and Budget as an independent arm of the executive branch. The O.M.B. differs from its predecessor in that it is vested with a wider range of powers and is charged with monitoring the

entire budget execution process. This further concentration of executive power did not pass unresponded.

In 1974, Congress passed the Congressional Budget and Impoundment Control Act, which contained a number of novelties.

One such novelty was that permanent budget committees were created in the House of Representatives and the Senate without the usual subcommittees. These committees were assigned to study the implications for the budget of existing and proposed legislation, changes in the tax code and other such actions. Second, a Congressional Budget Office was formed to provide Congress with information on all aspects of the budgetary process and to come up with alternative proposals on all government programs and fiscal and budget actions.

In conditions of state-monopoly capitalism, the significance of the federal budget, which affects all major aspects of the national economy, has grown markedly. The budget-making powers of Congress, too, have grown in significance during this period.

Under the new budget process enacted in 1974, Congress determines the purpose and size of all federal expenditures and revenues and fixes the size of the federal deficit and the federal debt ceiling. The C.B.O. monitors the implementation of the guidelines of appropriations bills passed by Congress and sees to it that the results are within the limits fixed by corresponding concurrent resolutions. It draws up 5-year forecasts of the impact that appropriations bills and resolutions will have on the federal budget, and at the beginning of each year, compiles an analysis of expected federal revenues and tax receipts over the next 5 years. An important task of the Office is to present a report on the budget each April 1 to the budget committees of the House of Representatives and the Senate. Upon a specific request by the budget and other committees, the C.B.O. is required to perform a study on budget issues.

American scholars point out that the creation in Congress of various types of auxiliary arms such as the General Accounting Office and the Congressional Budget Office has considerably improved the flow of information to Congress, but has not yet erased the advantage of the executive branch in this realm. Professor George C. Edwards III of Texas A & M University, in a book devoted to this imbalance, concludes that "members of Congress rarely have available to them expertise of the quantity and quality that is available to the president."[1]

[1] George C. Edwards III, *Presidential Influence in Congress*, W.H. Freeman and Co., San Francisco, 1980, p. 46.

In recent years the number of participants in the budget process has increased at the same time as budget issues have become more complex. The growth of government spending has brought about the sharpening of the conflicts on budget matters both between the White House and Congress and within the branches. Behind these conflicts lie far from coinciding interests of various socio-economic and political groups.

The President and executive agencies exercise an active budget initiative. Congress, to be sure, does not stand aside and let the executive branch have its way. It performs a quite important and energetic role in the process. However, even the most effective actions taken on Capitol Hill are in most cases nothing more than a reaction to initiatives of the executive branch.

Unlike many other capitalist countries, in the United States all appropriations bills are adopted by Congress twice (the question here is of all bills dealing with expenditures from the federal treasury). First, an authorizing act is passed which provides for specific measures and a certain amount of expenditures. No payments, however, may be made on the basis of an authorizing act alone. For this must be passed an appropriations bill containing mandatory instructions to the federal treasury on the payment of a specific sum of money from the federal budget.

By passing authorizing bills that determine the spending levels for each year, standing committees and Congress as a whole exercise control over executive agencies. Therefore, although authorizing bills are not mandatory for the treasury, the executive branch and its agencies and departments display a far from selfless interest in it, which breeds conflicts between the White House and Capitol Hill.

The necessity of passing two bills—an authorizing and appropriations—to spend money from the federal treasury has considerably strengthened the executive branch's position relative to Congress on budget matters. The reason for this is that the President can veto both authorizing bills and appropriations bills, and Congress, should it desire to override the veto and approve the spending, must do so twice. Thus, fiscal legislation is put in a much worse position relative to the executive branch than all other types of legislation.

The budget process can be roughly broken down into three stages: drafting, passing and execution. The first stage, as we have already made clear, is almost the private domain of the executive branch. During the second stage Congress has a much greater chance to display some initiative and stand up to the White House. Which branch is the stronger at this stage depends in general on the party make-up of Congress

and which party controls the White House, and also on the domestic political situation and the standing in the world of the United States.

The most important stage of the budget process, the execution of the budget, has since the very birth of the American Republic and notwithstanding certain changes been a sphere in which the Chief Executive has exercised his discretionary powers, what is termed in American sources as presidential spending power. In the process of executing the budget the President may transfer already appropriated funds to a different purpose, reprogram appropriations, and impound funds.

Having special significance for the financial relations within the system of checks and balances is the practice of impoundment, which in recent years has been the focus of attention of both academics, public affairs writers and statesmen.

Impoundment as it is most commonly referred to means the refusal of the executive branch to spend on a specific purpose funds appropriated by Congress. Thomas Jefferson is thought to be the first President to employ the tactic of impoundment. In 1803 he refused to spend money authorized by Congress for the construction of gunboats in connection with the Louisiana Purchase. For a long time impoundment was considered a positive measure for averting the waste of federal funds or for saving them for use in an emergency. In 1906 Congress legalized "bona fide impoundment" of appropriated funds, regarding it as a means of staving off a budget deficit. It should be noted that for a long time the federal courts turned down all suggestions that the President possessed an implied power to impound funds and thereby interrupt or halt the execution of appropriations bills sanctioned by Congress.

In the era of state-monopoly capitalism the President has far overstepped the bounds of "bona fide impoundment" of funds, which was a usual occurrence in the late 19th and early 20th century. Impoundment increasingly began to take the form of overt sabotage of Congress' fiscal programs, and its use became harder and harder to identify with the President's constitutional duties or his implied powers.

The modern history of impoundment as an independent, unlimited fiscal policy of the Chief Executive that works against the fiscal policies of Congress dates back to the 1940s. However, it was not until the late 1960s that the practice of presidential impoundment provoked a situation of sharp confrontation between the White House and Capitol Hill.

The situation changed with the arrival to the White House of President Richard Nixon, who launched an "Impound-

ment War" against Congress. Nixon adroitly employed the tactic of impoundment to torpedo or halt numerous programs initiated by Congress. American observers have pointed out that Nixon's frequent resort to impoundment hurt mostly domestic social programs, leaving military spending virtually intact. A constitutional crisis was brewing. Dennis S. Ippolito, chairman of the Department of Political Science at Emory University, wrote in this regard: "For more than four decades, Presidents had impounded funds. In most instances, the impoundments did not result in major confrontations between the executive and Congress. The language used by both sides when impoundments were contested was, until Richard Nixon, sufficiently moderate to allow compromises or at least face-saving. The Nixon administration managed to escalate the impoundment issue into a constitutional crisis, challenging directly Congress's authorization and appropriation powers."[1]

In 1973 and 1974 dozens of cases were brought before federal courts requesting that impounded funds be freed and spent on programs sanctioned by Congress. The majority of the cases were decided in favor of the plaintiffs.

Amid the Impoundment War, legislation was introduced in Congress aimed at putting an end to the executive branch's sabotage of appropriations bills sponsored by Congress. Finally, in 1974 a compromise was found in the Congressional Budget and Impoundment Control Act, which was an integral part of general budget reform legislation. The Act fixed procedures by which Congress could control impoundments, limited the number of grounds on which funds could be impounded, and introduced several new rules regulating the practice of impoundment. One new aspect of the 1974 Act was the attempt to establish two categories of impoundments—deferrals and rescissions. In the event of both types of impoundments applied simultaneously, the President is required to send an explanation to Congress. Should the President employ a rescission, the funds must be released unless Congress passes a bill sanctioning them within 45 days after it is informed by the President of his impending action. Funds blocked by a deferral can be released if either house of Congress vetoes the impoundment decision.

The use of impoundment by the President was in effect akin to an item veto, which the Constitution does not grant the Chief Executive. The effectiveness of impoundments also resulted from their irreversibility, for, unlike normal presidential vetoes, Congress could not override the item veto in the form of impoundment. Attempts by the courts to control impoundments taken before the enactment of the 1974 law were little effective for the simple reason that the consideration of each individual case dragged on in the federal courts for years. The 1974 Act indisputably armed Congress with certain rights for checking the practice of impoundments and provided it the opportunity to cancel some of them. However, this in no way means that the executive branch was brought fully under the control of Congress on budget matters.

[1] Dennis S. Ippolito, *The Budget and National Politics*, W.H. Freeman and Co., San Francisco, 1978, p. 139.

The procedures for controlling impoundments established by the 1974 Act are complex and cumbersome, and their application entails a large loss of time. It is sufficient to note that during his brief presidency Gerald Ford presented to Congress 330 deferrals and 150 rescissions, a number that an already overworked Congress could not possibly thoroughly consider. Moreover, as long as the budget remains the President's province and Congress does not plan and adopt a budget itself, the situation of the two branches in respect to fiscal matters remains practically unchanged.

Of particular interest is the interplay of the executive and legislative branches in the specific area of balancing the federal budget. Much noise has been created over this issue during the Reagan presidency. But first let us note that the federal budget deficit, only recently measured in the tens of billions of dollars, has now reached proportions of hundreds of billions. Back in his 1980 campaign for the presidency Ronald Reagan said that balancing the federal budget would be one of his top priorities if elected. Reaganomics, however, have had an entirely opposite effect.

The present Chief Executive of the United States launched his presidency on the solid promise of ending the federal deficit by the year 1984. A year did not pass, however, before it became clear to even the uninitiated in America that these promises had no real basis behind them and were doomed to become a part of the mounting evidence of the impotency of Reaganomics.

By the beginning of Reagan's second term in office talk of an economic revival and rapid growth began to be superseded more and more by pessimistic forecasts by American economists. If growth was observed in some area, it was in the size of the federal debt, which is now about 1.7 trillion dollars.

The size of the federal debt is one of the leading causes of the serious disruptions of the American economy. The U.S. Administration is simply powerless to stop the further growth of the federal budget deficit, which in 1985 reached 210 billion dollars.

The widely publicized deficit-cutting measures adopted by the Administration in 1984 to trim the federal deficit by

140 billion over 5 years could not even halt its growth. No economic miracle came about because nothing was done to tackle the chief source of budget deficits—the steady escalation of military spending. For more than 10 years, as a direct result of the astronomical military budget, spending in the federal budget has outpaced revenues. The Reagan Administration resolved to "bring order" to the budget picture by employing the age-old method of slashing excesses: in this case 17 social programs were cancelled and another 20 frozen. But the effect of such severe measures is sapped by the tax reform planned by the White House. Under the proposed measures, the richest Americans will have their tax burdens cut by 11 percent, while tax rates for the poor will be changed little if at all. The mass redistribution of income in favor of the most well-off will aggravate the problems of the American economy. More than 8 million Americans are affected by unemployment, and 35 million Americans live below the official poverty level.

The escalation of military spending and the resultant enlargement of the federal debt are an excessive burden even to such an economy as the United States'. The pungent debate in Congress on the Pentagon budget is evidence that U.S. law-makers are beginning to realize the underlying causes of the unevenness of economic growth—the militaristic course of the U.S. Administration.

In the 1980s a campaign was mounted in the United States to adopt a special amendment to the Constitution that would once and for all resolve the harrowing problem of the budget deficit, forcing the federal government to adopt only balanced budgets and thereby putting an end to all deficits.

Public opinion polls witness that between 70 and 75 percent of Americans support the idea of a constitutional amendment on a balance budget. Yet many people possessing special knowledge and political experience do not share the naive faith of the average American in the omnipotence of constitutional prescriptions. With the same hope of success constitutional amendments could be passed outlawing unemployment, crime, poverty, drug addiction and other banes of American society. Opponents of the amendment rightly point out that in almost every state there is legislation mandating a balanced budget, and yet so far with little effect.

The various drafts of the proposed constitutional amendment reflect in one form or another the notion that the budget must always be balanced, in other words, that revenues must correspond to outlays. Some drafts envisioned a budget deficit for no more than 3 years out of every 8. Almost all the drafts contain the provision that outlays can exceed revenues in time of war and in emergency situations. But in such cases the budget deficit must be approved by a

qualified majority in each house of Congress. The authors of several drafts, trying to be more realistic, suggest balancing the budget not on a 1-year basis but in the course of 2 or 3 years.

Articles have appeared in the press warning that the adoption of a budget-balancing amendment would impair the ability of the federal government to tune the national economy. Moreover, it is argued, such a law could be easily evaded, and would inevitably lead to the loss of respect for the entire legal system. And it is stressed that the proposed amendment fails to impose any type of punishment for the adoption of an unbalanced budget. This raises the related question of who should be punished, the President or Congress?

Finally, the thing most feared is that the adoption of the amendment would irreversibly cripple the whole system of constitutional checks and balances. The realization of its provisions would require Congress to cede enormous power to the judiciary and the President. Federal Reserve Board Chairman Paul Volcker, as *Time* magazine reported, warned Congress that the adoption of the amendment "could give the President a line-item veto of the entire budget and grant him, in effect, the power to impound any federal funds he wishes. Congress would no longer be able to mandate or create new programs. In the name of balancing the budget, the President could theoretically drop entire programs without any possibility of congressional review."[1]

To this day it remains unclear who will be able to enforce compliance with the proposed budget-balancing amendment. Some have expressed the opinion that the U.S. Supreme Court will be called on to conclusively answer this question. In other words, it is proposed that the judicial branch will in effect run the country. For now the chances remain slim that legislation on a budget-balancing amendment to the Constitution will pass Congress and be ratified by three-fourths of the state legislatures.

The real *relationship between the President and Congress in the area of foreign policy* cannot be construed from the text of the Constitution in a literal reading. The foreign policy powers exercised by the executive and legislative branches are far broader than the amazingly brief description of them in the Constitution. Two main reasons can be given for such a large gap.

First, the foreign policy activities of the United States in the early 19th century, only a short time after it had

[1] *Time*, August 9, 1982, p. 31.

gained independence, cannot stand comparison with the present level of foreign policy of the United States, the single most powerful country in the capitalist world.

Second, American constitutional law theory is based on the general assumption that the federal government's foreign policy powers are extra-constitutional. In one Supreme Court ruling on this issue, it was noted that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[1]

At the foundation of such theoretical arrangements lies the assumption that from the moment of independence and up to the ratification of the Constitution in 1787 the states possessed "internal sovereignty," while the powers of "external sovereignty" were the exclusive realm of the federal union of states. Therefore, the federal government's internal powers arose as a result of individual states delegating them to "a more perfect Union," while no external powers were delegated, "for these had already belonged to the Union before the Constitution. The Constitution did not enumerate them; it assumed them."[2] Thus, the foreign powers of the Union were derived from the intentions and spirit of the Constitution and from general principles of international law, but were not, with the rare exceptions, enumerated in the text of the Constitution.

The exercise of foreign policy powers, both constitutional and extra-constitutional, is the joint duty of the executive and legislative branches which, however, are far from equal partners. Read literally, the Constitution seems to regard the President as above all the administrator of foreign policy, and not its initiator. Yet already in the first years of the American Republic, such an interpretation sharply contradicted the real state of affairs. Certain sections of the Constitution make it clear that the Founding Fathers sought to limit the war-making powers of the President, restricting his role to that of "Commander-in-Chief of the Army and Navy" of the United States; Congress, on the other hand, was invested with all fiscal powers, including responsibility for raising an army and navy, and the sole power to declare war

[1] Gerald Gunther, *Cases and Materials on the Constitutional Law*, The Foundation Press, Inc., Mineola (N. Y.), 1975, p. 276.

[2] Louis Henkin, *Foreign Affairs and the Constitution*, The Foundation Press, Inc., Mineola (N.Y.), 1972, pp. 21, 22.

and acknowledge the state of hostilities. Responsibilities for the repelling of foreign invasions and the conduct of war were laid exclusively on the President.

The Constitution spells out rather simply the powers of the President relative to the conduct of foreign policy. Section 2 of Article II reads: "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States... He shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls... He shall receive ambassadors and other public ministers."

The Constitution dwells in much greater detail on the foreign policy powers of Congress. In Section 8 of Article I, for instance, it is stated that Congress has the power to regulate commerce with foreign nations; to punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; provide and maintain a navy; make rules for the government and regulation of the land and naval forces; provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. It should be added that the Senate participates, together with the Chief Executive, in the signing of foreign treaties and the appointment of ambassadors and consuls.

An analysis of the constitutional provisions spelling out the foreign policy powers of the legislative branch and the executive branch allows us to make two conclusions. The first is that the foreign policy powers of the President are incomparably smaller than those of Congress in this area. The second is that alone, without the participation of Congress, the President executes only one power in the area of foreign policy—that of receiving ambassadors and other official representatives of foreign nations.

In its pristine form, the constitutional arrangement of checks and balances relative to the conduct of foreign policy was put together in a way that made the executive branch inferior to Congress. The latter was vested with the exclusive right to declare war, to raise and maintain an army and navy, and had a decisive say in the making of foreign treaties and the appointment of ambassadors and consuls. It was immediately clear that the power of Congress to declare war did not extend to the event of a sudden foreign invasion, and the suggestion that Congress be vested

with the power to conduct war in addition to the power of declaring it was rejected by the Constitutional Convention.

The position of commander-in-chief of the armed forces was construed as being purely military, not political, and was therefore not linked with the political aspects of declaring war and conducting military operations. As was underscored by Hamilton in *The Federalist*, the position "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy."[1] In all likelihood, the Framers of the Constitution thought that "bestowing this title upon the Chief Executive did little more than place him at the apex of the military hierarchy—that is, make him the First General and Admiral."[2]

A similar attitude to the President as commander-in-chief of the military is manifest in court decisions of the era of industrial capitalism. In an 1850 decision, the Supreme Court ruled that the President's powers and responsibilities in this area were "purely military."[3] Even after the Civil War, no changes were made in the official attitude toward the duties of the commander-in-chief, which continued to be viewed as "purely military."

Upon the entrance of the United States into the stage of imperialism the attitude to the war powers of the President began to change: his powers significantly expanded, and their use became more and more discretionary. The President's war powers were clearly contrasted to the constitutional delegation to Congress of the exclusive right to declare war. From the very beginning, the narrowly defined powers of the President as commander-in-chief of the country's armed forces considerably outweighed the war powers of Congress. Conflicts between the two branches over the execution of war powers were a manifestation of the true balance of power between them at various points in history. It was only natural that these conflicts could have no catastrophic consequences and more often than not were resolved by compromises or voluntary concessions by the legislative branch.

The two world wars and several smaller conflicts left the American President in total domination over military affairs. This arrangement utterly suited the foreign policy interests of the U.S. ruling elite. Until the outbreak of World War II, the waging of undeclared "presidential wars" was allowed only in instances when a foreign army had invaded U.S. territory. Today, when the American ruling elite are striving for

[1] *The Federalist. A Commentary on the Constitution of the United States*, p. 430.

[2] Laurence H. Tribe, *American Constitutional Law*, p. 172.

[3] Fleming v. Page, 9 How. (50 U.S.) 603, 615 (1850).

hegemony on a world scale, such wars have been made possible and "legally justified" in the event of a real or perceived invasion of one of the United States' many allies in military blocs.

A lion's share of the war powers originally delegated to Congress is now in effect in the hands of the President. In particular, notwithstanding the constitutional reservation that only Congress may declare war, American Presidents have many times on their own moved U.S. troops abroad launching aggressive wars; in these cases Congress was left to automatically seal the President's actions in their wake.

"Once the nation is engaged in war, the reservoir of presidential power fills rapidly as Congress delegates vast new duties and responsibilities to the executive branch... Furthermore, these delegations remain in the hands of the president long after hostilities have ended, long after American troops have returned home."[1] It is noteworthy at this point that the very meaning of the term "war," its boundaries previously never in doubt, has lately become very elastic.

All these observations directly indicate that, if he wishes, the President may disregard the constitutional powers of Congress to declare war. This fact is confirmed by U.S. history. American Presidents have dispatched American troops overseas more than 200 times, and only in 5 of these instances it was Congress that declared war. American theoreticians have coined the terms "quasi-war," "partial war," "police war," and "police action" to describe wars the President may wage in circumvention of Congress, on the strength of his powers as commander-in-chief. Accordingly, one of the bloodiest wars ever waged by the United States, the Vietnam War, was not at all a war but a "police action" legalized by the Tonkin Gulf Resolution.

Since the U.S. Constitution vested the Chief Executive with the power to wage war lawfully sanctioned by Congress, the undeclared wars against Vietnam, Laos and Cambodia, the military occupation of Grenada, the landing of marines in Lebanon, the proxy war in Nicaragua fought through "contras" and the numerous other military interventions in other parts of the world witness that the American President has in effect become a military dictator despotically launching and waging war. As a result, presidential power in the United States has come to be referred to as "imperial."

At the height of the Watergate scandal in 1973, Congress irked by the increasing war powers of the President passed the War Powers Resolution, which severely limited the President's ability to freely introduce American troops over-

[1] Louis Fisher, *The Constitution Between Friends. Congress, the President, and the Law*, St. Martin's Press, N. Y., 1978, pp. 220-21.

seas, making such a move contingent on approval of Congress given in advance or shortly thereafter. In passing the Resolution Congress sought to regain from the White House its once enjoyed powers to declare war. The stated purpose was to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."

The limitations contained in the War Powers Resolution were nevertheless unable to place the President's execution of war powers under complete Congressional control. As commander-in-chief, the President is able to dispatch American troops to any point in the world without consulting Congress. In the opinion of two leading American scholars, "Limited recognition of the need to restrict presidential freedom in foreign affairs was demonstrated when Congress passed the War Powers Act over President Nixon's veto in 1973. The law requires congressional approval of the use of American forces in hostilities beyond a certain period. Although the law signifies some shifting back of the balance of power between Congress and the president, the reaction against presidential abuse of authority in foreign affairs is limited for three reasons. First, a president can evade a congressional injunction by invoking a crisis or an emergency. Congress would not dare question a president's judgement during the heat of a crisis. Second, the most significant feature of presidential power in foreign affairs is not the sudden and dramatic resort to military force. Instead, presidential activity is part of an institutionalized process directed to the defense of corporate and governmental interest abroad. There are few dramatic acts in this vast domain comparable to the escalation of the Vietnam war. Third, debates about whether Congress or the president should exercise greater power in foreign affairs overlook the substantial measure of agreement between the two branches of government on the aims of America's actions abroad. Despite some confrontations between Congress and the president on foreign and military policy, the usual situation is the predominance of a 'hard line' in both branches and agreement on the desirability of corporate expansion abroad."[1]

The American authors thus acknowledge the class bias of the United States' foreign policy—to strengthen the positions of American capitalism through corporate expansion. To carry out this course the two branches of government work together, and military power serves as a weapon in the U.S. bid for world domination.

American military power has long exceeded the level necessary for insuring the country's security. The United States Armed Forces are a weapon to be used for expansion and the attainment of hegemony. With the coming to power of the Reagan Administration the U.S. military buildup has assumed a particularly ominous scale. The Administration's comprehensive strategic program for the 1980s provides, among other things, for the buildup of strategic offensive forces. Plans are under way for the militarization of space, the modernization of forward-based nuclear weapons, and the building of new nuclear warheads, aircraft and warships.

[1] Ira Katznelson, Mark Kesselman, *The Politics of Power*, pp. 271-72.

In American political and legal literature, the duties of the President in respect to the *concluding of international agreements* are often portrayed as a prerogative of the executive branch of government which is exercised with no more than the nominal participation of the Senate. The notion is advanced that the President's position as "leader of foreign policy" makes the right to conclude international agreements an integral part of his prerogatives. Such an approach leads to a simplified interpretation of the relationship between Congress and the President on foreign affairs matters. The making of foreign treaties is a constitutional power that is held jointly by the White House and Congress. Although having different roles, both branches of government are equal partners in this area.

The entire process of concluding foreign agreements can be broken down into three stages. First, the President either personally or through intermediaries holds negotiations with representatives of a foreign state; in the event that the negotiations are successful, a draft treaty is drawn up which does not carry the force of law, even if it were signed by the President and the representative of the other side equal in rank. Second, in accord with the provision "with the advice and consent of the Senate," the Senate (on a two-thirds vote of present Senators) gives its consent to the President that he ratify the treaty. And third, the treaty, having received the sanction of the Senate, is sent to the President, who ratifies it by signing it. Only after receiving this signature by the President does a foreign treaty become the "Supreme Law of the Land." The ratification of foreign treaties is thus a shared and indivisible duty of the President and the Senate.

Obtaining senatorial consent for foreign treaties is by no means a purely formal procedure. The Senate enjoys practically unlimited powers in respect to treaties sent to it. Upon the completion of successful negotiations the President sends to the Senate the draft of the proposed treaty together with his comments. In the Senate, the treaty is relayed to the Foreign Relations Committee, which carefully

studies it in closed session. The Committee wields vast power over foreign affairs. It can present the treaty to the Senate without making any changes in it, or it can withhold action on the treaty, which ultimately means its rejection. The Senate itself can refuse to relay a treaty to the Foreign Relations Committee, or it can drag out hearings on it. The latter tactic was resorted to by the Senate in its handling of the SALT-II treaty signed by the leaders of the Soviet Union and the United States in 1979 in Vienna.

The Senate Foreign Relations Committee has the power to make any amendments or changes in a foreign treaty sent to it. When the Committee reports on the treaty to the full Senate, each of the treaty's clauses is debated and voted on separately, with a simple majority of Senators present needed for approval. For final approval, the treaty needs the support of two-thirds of the Senators present, being voted on in the form of a resolution. The Senate has the right to withhold its final decision and may demand that the President formally present for consideration amendments proposed by the Senate. In other words, the Senate may alter a treaty so significantly as to require a new one to be negotiated, as the altered version may prove unacceptable to the other side.

Historically, the Senate has rarely refused consent to a foreign treaty negotiated by the President. Yet it has often enough displayed obstinacy, moving Presidents to look for other ways of entering into foreign agreements without obtaining the consent of the Senate. Such a substitute was found in executive agreements.

There is a widespread assumption in the United States that the executive branch's legal basis to conclude such agreements with foreign states is rooted in specific presidential powers (as commander-in-chief of the armed forces, head of state and government and the nation's top representative in foreign relations) and in law. Congress can theoretically block any agreement enacted by the executive branch by withholding the funds key to its execution. However, Congress rarely resorts to this measure out of reluctance to put the President in an awkward position before other countries.

American constitutional scholars lean toward the thought that Congress should be informed of executive agreements beforehand, otherwise it would be left with no influence on the agreement whatsoever. The record has shown, however, that in a number of instances Congress had been completely unaware of executive agreements already signed and enacted. In 1969 and 1970, for example, the Senate Foreign Relations Committee established that U.S. Presidents had secretly signed executive agreements with South Vietnam, South Korea, Thailand, Spain and some other countries without

informing Congress. To halt such practices by the White House Congress passed a law in 1972 requiring the Secretary of State to inform Congress within 60 days of any foreign agreements signed by the executive branch. Congress buttressed this law in 1977 with the passage of legislation requiring all federal departments or agencies entering into any international agreement on behalf of the United States to present the text to the State Department within 20 days of its signing. Yet, it has been pointed out that "neither of these two laws actually limits the president's power to act without Congress in defense and foreign affairs."[1]

The overall number of executive agreements is vast, they run into thousands, but no exact count has been kept. Figures in American sources range widely, but on all accounts they witness that the number of such agreements far exceeds the number of treaties. Unlike foreign treaties duly ratified, executive agreements do not legally outweigh Congressional statutes (should any of their provisions contradict domestic law), and yet practically they are identical to treaties. Congressional control over executive agreements is largely nominal owing to Congress' lack of the necessary means to totally impair the President's ability to enter into international agreements.

To conclude our analysis of presidential powers in the area of international agreements, let us examine the question of the abrogation of foreign treaties. The Constitution is completely silent on this question. Yet from the dawn of the American Republic a practice was established under which foreign treaties are abrogated only with the sanction of Congress. In recent years Presidents have chosen to act on their own in such decisions. Assailants of the right of Presidents to unilaterally abrogate or suspend international agreements base their case on the following arguments. First, if international agreements are made by the President with the consent of the Senate, then their abrogation should also be subject to the same procedures, that is, with the approval of the Senate or entire Congress. Finally, if the President does not have the right to repeal laws at his own initiative, why should he be able to invalidate foreign treaties which according to Article VI of the Constitution are the "Supreme Law of the Land"?

This issue was placed before the American public following President Jimmy Carter's cancellation of the Taiwan Treaty of 1954. Sen. Barry Goldwater and a group of members of Congress filed suit against the White House in the federal court, demanding that the President's actions be declared unconstitutional and the Congress' right be affirmed of participation in decisions resulting in the termination of

[1] George C. Edwards III, *Presidential Influence in Congress*, p. 17.

foreign agreements. The U.S. Supreme Court rejected the plaintiffs' argument, calling the issue a "political question" outside the Court's jurisdiction. As Goldwater saw it, however, the Court in this case had "avoided its responsibility to say what the law is. By avoiding its duty, the Court would, in effect, allow the President to substitute a system of raw power for the rule of law. If the highest Court will not rule upon an obvious usurpation of legislative power by the President because it involves what the Court calls a 'political question', the road is open to a dictator."[1]

A fair share of demagoguery is evident in this statement. But it is also clear that in U.S. constitutional practice the question of whether the President is legally entitled to unilaterally abrogate international agreements entered to with Senate approval remains unsettled.

The terse constitutional clause empowering the President to "receive ambassadors and other public ministers" has played an immense role in strengthening the executive branch's hand in the conduct of foreign relations. By virtue of this authority, the President is in theory the United States' singular head in relations with other nations. When the French citizen Edmond Genet, sent to the United States in 1790 as the envoy of the First Republic, presented his credentials to Congress, Secretary of State Thomas Jefferson explained to him that relations with foreign states were executed only through the President. He returned Genet's exequatur request and told him that it would be granted only if properly addressed. Ever since then the United States has gone by the principle that the President enjoys the sole authority over foreign relations and no other person may interfere in this sphere.

The principle of counterposing the legislative and executive branches of government underlying the system of checks and balances is reflected in a certain symmetry of powers enjoyed by the competing yet cooperative branches.

The effective roles of the executive and legislative branches in government must be taken into account in order to gain a true sense of how effective they are in influencing one another in the shaping and realization of national policies. In theory and according to the dogma of American constitutionalism, Congress should predominate. However, it is not for nothing that the President carries the title of the Chief Magistrate of the Nation. His broad influence over national policy is especially noticeable when a single party controls

[1] *Congressional Record*, Washington, December 14, 1979, Vol. 125, No. 179, p. S 18618.

both houses of Congress and the White House. But even in years when no single party is in control Congress remains subject to effective influence by the White House.

In American political commentaries since the Watergate scandal one often comes across the line of thinking which assumes that "the President proposes, and Congress disposes." This should not be accepted for anything more than a fleeting limerick. There have been times in U.S. history when Congress succeeded in blocking White House programs, but this in no way affected the overall pattern that can be observed in any advanced nation in the West whatever its form of government, according to which the executive branch enjoys ultimate power over the shaping and carrying out of key political decisions.

Transplanted to American soil, the peculiarly European idea of the separation of powers acquired new attributes and was filled with new content. In Europe this idea was born amid a struggle pitting the bourgeoisie against feudalism. However, in the American colonies and in the several states that formed a Union after the adoption of a Constitution, different socio-economic conditions obtained. The American Framers of the Constitution, unlike their British counterparts, did not see in the predominance of the parliament a panacea against all evils. Nor did they share the Frenchman's mistrust of the courts, which before the French Revolution of 1789 blindly dispensed justice on behalf of the monarchy.

A small and poorly developed nation which America was 200 years ago grew into a superpower with a well-developed state-monopoly capitalist economy. Changed, too, is the very notion of separation of powers. In the America of today one could hardly find a discussion of the system of checks and balances that does not take into account the influence of such political factors as corporations, the permanent bureaucracy, political parties, pressure groups and the mass media.

The increased complexity of relations between the branches of government, the social evils accompanying "the American way of life" which have penetrated American society, the influence of corporations and the spirit of profit have all largely deformed the ideals of American constitutionalism as they apply to the system of separation of powers. For this reason the operation of the system of separation of powers is invariably accompanied by crises and continual conflicts—whether visible or concealed—between the three branches of power. On the whole, however, the evolution of this system is determined by a tendency of the executive branch, the most effective weapon of the ruling elite in a capitalist state, to become stronger.

Chapter 2

AMERICAN FEDERALISM. CENTRIPETAL TENDENCIES

The principle of federalism, one of the main attributes of American constitutionalism, is founded on such concepts as states' rights, autonomy of local administrative units, republicanism, limited government and political pluralism. The merger of 13 "free and independent states," British colonies before the revolution, into "a more perfect Union" was an act that was to have tremendous historic importance. Two centuries ago world's first bourgeois federation was created that came to serve as a model for many other states. The Constitution of 1787 legitimized on the American continent what Karl Marx called "the idea of one great Democratic Republic."[1]

The democracy of the new federation was evident, as the states which had come together to form the Union reserved considerable rights. However, the political motives that drove the Founding Fathers to establish a durable federal government were far removed from the desire to witness the institution of genuine democracy and vest the states with broad powers. The federal form of government established by the Constitution was the result of a class compromise between the bourgeoisie and slaveholders, who were alarmed at the public disturbances and the squabbles of the confederacy. The need for a strong central government was quite urgent, as only with that could the ruling classes hope to shore up their positions and keep the people in check. In forming the strong central apparatus, a significant part of the "sovereign" states' rights were delegated to the federal government.

The adoption of the Constitution and the formation on its basis of a federal republic with a presidential rule spelled the victory of the conservative propertied stratum over the democratic masses. The delegates to the Constitutional Convention could in no way be called revolutionary democrats. By the standards of the time they were at best mild conservatives. Witnessing this were their candid declarations recorded in the protocols of the Convention; many delegates did not conceal their fear of the people or of true democracy. They

[1] Karl Marx, "To Abraham Lincoln, President of the United States of America", Karl Marx and Frederick Engels, *Selected Works* in three volumes, Vol. 2, Progress Publishers, Moscow, 1977, p. 22.

saw in a strong central government a guarantee that private property would be protected.

American federalism underwent a long and arduous development. The ultimate direction has been determined by a struggle raging to this day between separatism and centralism. One feature of this struggle is that the call for "sovereign rights," which at one point in American history was the rallying cry of advocates of democracy, later began to be embraced by reactionary elements in the states to resist liberal programs of the federal government.

1. CONSTITUTIONAL UNDERPINNINGS OF FEDERALISM

The Constitution contains no reference to federalism. However, its principles are key to the form of government which, with the ratification of the Constitution, came to replace the Confederation. Not mentioning "federalism" textually, the Constitution nevertheless implies it in a number of clauses. For instance, the Constitution rather thoroughly defines the status of the Union and its subjects by delineating the powers of the federal government (in the person of its highest bodies) and the states and balancing the rights enjoyed by the federal government and the individual states. Such clauses can be found in Articles I, III, IV and VI.

Section 8 of Article I of the Constitution enumerates the powers that are enjoyed exclusively by the Union. This list of powers should be examined in conjunction with Section 10 of Article I, which states precisely the limitations on the powers of the states in favor of the Union. Thus, "no State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, ...pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." Also, without the consent of Congress, no state shall impose duties on imports or exports, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless invaded. In addition, Amendment XIV prohibits the states from making or enforcing any law abridging the privileges or immunities of citizens of the Union, and from depriving any person of "life, liberty, or property" without due process of the law, or equal protection of the law. Amendment XV prohibits the states from denying the right to vote on account of race or color, Amendment XIX on account of sex, and Amendment XXIV by reasons of failure to pay any poll tax or other tax.

The clause in Section 10 of Article I prohibiting the states

from entering into alliances and confederations and concluding international agreements meant in effect that states could not carry out foreign relations. From subsequent Supreme Court decisions, a precedent emerged according to which the conduct of foreign relations was the sole responsibility of the federal government in the person of Congress and the President. The "sovereign" states are in fact not fully sovereign. The political ramifications of this prohibition became most evident during the Civil War of 1861-1865, when the federal courts, citing Section 10, succeeded in showing that the rebellious confederation formed by the states that seceded from the Union was unconstitutional. In other words, Section 10 was invoked to show that the states did not possess the right to secede from the Union.

In the other prohibitions imposed on the states by Section 10 can be discerned a desire by the Constitution's Framers to preclude attempts by the states to encroach upon the powers of the Union. The ban on keeping troops or warships in peacetime, for instance, once again underscores that the U.S. armed forces are the sole responsibility of the federal government. This ban, however, does not affect the right of states to raise a militia (National Guard) for the maintenance of public order.

An important role in the formation of American federalism was played by the right of states to enter, with the consent of Congress, into agreements with other states. This clause greatly contributed to the institutionalization of so-called horizontal relations between the states. Initially, inter-state compacts were concluded mainly to settle counterclaims regarding borders, but in recent years these compacts encompass various aspects of relations. The subjects of such compacts may be individual states, or all the states. Amid a general tendency of expansion, inter-state agreements are still of limited significance, as they have been most effective in the regulation of only minor problems.

Amendment X states that the powers not delegated to the United States by the Constitution "are reserved to the States respectively, or to the people." The purpose of this Amendment was to dispel the fears of champions of states' rights and the rights and freedoms of citizens that the federal government could unhindered encroach on rights not specified by the Constitution. The most important of the rights reserved to the states was the right to hold elections; regulate in-state commerce; establish local government bodies; organize health care and a system of judiciary and maintain public order; and adopt and amend state laws and constitutions.

In constitutional practice, however, the seemingly rigid

scheme delimiting the powers of the federal government and the states is supplemented by a number of amendments whose existence is owed primarily to the ambiguity of the formulations in the Constitution itself. For instance, of tremendous significance for the expansion of the federal government was the final part of Section 8, Article I, which reinforced the principle of implied powers, according to which all newly arising subjects of regulation are to be within the jurisdiction of the federal government. It also gives Congress the right to "make all Laws which shall be necessary and proper" for executing the powers of Congress and the whole government. This dictum is commonly known as the "necessary and proper" clause of the Constitution.

Strictly speaking, the Constitution does not empower Congress to enact any laws which it deems "necessary and proper," but only those which are "necessary and proper" for carrying out the powers expounded in Section 8 (or the powers of the executive and judicial branches). However, by virtue of the fact that the cited powers are themselves formulated in the Constitution only in a general way and in many respects nebulously, the "necessary and proper" clause became a legal basis for the expansion of the powers of Congress and, on the whole, of the entire federal government, including the courts and executive branch agencies.

The "necessary and proper" clause has gained a special place in American constitutional law and in the practice of the highest bodies of power in the United States. This is because the concept of "necessary and proper" is so broad that it allows both Congress and the courts to arbitrarily, as required by political conditions, interpret and expand the powers of the government. The tail end of Section 8 thus lends malleability to the clauses relative to the powers of the government, enabling them to be adapted to the nation's constantly changing governmental, economic and public life. In American constitutional theory, the "necessary and proper" clause has come to be known also as the "elastic" or "coefficient" clause.

In discussing the balance of powers between the federal government and the states it should be mentioned that there also exists a range of overlapping powers. Among them are the enactment of laws and their enforcement, taxation, allocations for welfare, loans, judiciary, regulation of the activities of banks and corporations, and acquiring property for public use.

Thus, in the context of the Constitution, the boundary delineating the powers of the federal government and the states is quite cloudy. In practice this boundary is rather mobile, and the real balance between the federal government and the states is tipping steadily toward mounting centralism,

although there have been periods of reverse movement. In the latter half of the 19th century and the first few decades of the 20th, for instance, the Supreme Court tended to underscore the states' rights and sought to maintain a balance between the powers of the states and those of the Union. Beginning in the late 1930s, amid the rise of state-monopoly forms of American capitalism, the Court began gradually to shift its position toward upholding the implied powers of the federal government. In this spirit, the Court, in a 1941 decision, ruled that the power of Congress to regulate interstate commerce "is not a forbidden invasion of state power" and "is not prohibited unless by other Constitutional provisions." It also ruled that the power of Congress over interstate commerce can neither be "enlarged nor diminished by the exercise or non-exercise of state power." Furthermore, it remarked that the Tenth Amendment is "but a truism that all is retained which has not been surrendered."[1] Thus, the Tenth Amendment was no longer considered an absolute guarantee of the inviolability of states' rights. American federalism of the last third of the 20th century has little in common with the balance between the states and the Union established by the Founding Fathers. Over the course of American history, a radical change occurred in the balance of powers within American federalism in favor of the federal government. Decentralization was pushed aside by centralization.

The process of centralization, which expressed the action of the fundamental laws of state-monopoly capitalism, was also promoted by purely legal peculiarities in the way the principle of federalism was formulated in the Constitution.

For instance, the provision in Section 8 of Article I giving Congress the power to "regulate commerce with foreign nations, and among the several States and with the Indian tribes" is worded tersely. However, the effective meaning of this provision, as interpreted by Congress and the courts and applied in practice, and its significance to the expansion of American capitalism and the transformation of the United States from a small agrarian nation into an imperialist superpower is tremendous. This brief provision—the commerce clause—is the principal source for the steadily expanding regulatory powers of the federal government over the economy and an unequivocal limitation on the economic powers of the states.

The Constitution was adopted at a time of overwhelming economic dislocation on a national scale and of unbridled commercial rivalry among the states. The incorporation in

[1] *Cases and Materials on Constitutional Law*, pp. 137, 182.

the Constitution of the commerce clause had the immediate aim of suppressing economic rivalry among the states, which at times broke out into open warfare. American scholars note that although the Founding Fathers intended the commerce clause to be a check on states' rights, they were hardly able to foresee that its application would become an additional source for the steady accumulation of real power by the federal government.

Today, after numerous interpretations by the courts, the constitutional concept of "commerce"—to be used interchangeably with "commercial intercourse"—implies all forms of the movement across state borders of persons and goods with the aim of making a profit or otherwise, all forms of communication or commercial broadcasts transcending state borders, and all forms of commercial agreements involving the transportation of persons, property, services or energy across state borders. Also construed as "commerce" is the extraction of raw materials, the operation of industrial enterprises, the regulation of incomes, the fixing of the legal work day and a host of other social and economic functions. In short, a broad interpretation of the commerce clause has gradually led to the inclusion under the regulatory powers of Congress of almost all aspects of economic life in the United States. Of course, the power of Congress to legislate on economic matters extends only to the point where it does not impinge upon the interests of private enterprise. Corporate interests are protected from "excessive" encroachment on the part of the government both by constitutional provisions (and their subsequent interpretation by the courts) and by the very law-making policies of the American capitalist state.

The notion "commerce among the several states" (or "inter-state commerce") has undergone several court interpretations and is today understood to mean commercial intercourse among various states. This notion is interpreted so broadly as to allow Congress to exercise its regulatory powers over commerce every time the need arises. The power of Congress over inter-state commerce extends to virtually every area of the American economy with the exception of several minor questions that have been left to the states. Its practical significance defined in numerous laws enacted by Congress and in Supreme Court rulings, the commerce clause has been instrumental in overcoming the particularism of the states and in creating a nationwide market and a monolithic capitalist economy.

Article VI of the Constitution was of enormous significance for the development of American federalism. The second part

of this Article reads: "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." The Constitution thereby incorporated one of the most important principles of American government—the supremacy of the federal law over the legal enactments adopted and enforced by the individual states. The supremacy clause, as this constitutional principle is often called, is the driving force of American federalism, the legal foundation for the development of centralistic tendencies within the federation.

During the debate on the draft of the Constitution, it was noted that the former, confederative government was weak, and that the proclamation of the supremacy of the federal law—the Constitution, laws and treaties—would facilitate the practical tasks of creating a durable Union with the central government that would enjoy real power over its subjects within the federation. This theory was conveyed quite concisely by Governor Johnston of North Carolina: "The Constitution must be the supreme law of the land, otherwise it would be in the power of any one state to counteract the other states, and withdraw itself from the Union. The laws made in pursuance thereof by Congress ought to be the supreme law of the land: otherwise, any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper."[1]

To prevent the supremacy clause from becoming an empty declaration, the Framers of the Constitution built into it a mechanism that would effectively guarantee adherence to it. This was the provision obliging state judges, in the event that state laws or constitutions contradicted federal law, to abide by the latter. The realization in practice of the principle of supremacy of the federal law was also to be ensured by the third part of Article VI, mandating that all American government officers—whether a state administrator or member of the Supreme Court—support the federal Constitution. This means that should, for example, a state law empower a governor to take some action contradicting the letter and spirit of the federal Constitution (even though that action would be legal under the provisions of the state constitution), the governor would be obliged not to follow the instruction. Article VI thereby solidified the motley assemblage of laws of the individual states by aligning these laws

[1] Cited in David Hutchison, *The Foundations of the Constitution*, University Books Inc., Secaucus, N. J., 1975, p. 245.

with the legal norms of the federation.

In American constitutional and political practice the supremacy clause had two important consequences.

First, it facilitated (together with other provisions of the Constitution) the drastic consolidation of the central government's power through the expansion of legislation areas it can regulate, thereby spurring powerful centralistic tendencies which today largely characterize American federalism. In the early 19th century, the Supreme Court ruled that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."[1] Even if a state should enact a law invoking the "sovereign rights" guaranteed it, but this law contradicts the Constitution or a federal law or treaty, that law is automatically declared invalid and must give way to federal statutes.[2]

Over the entire course of American history, the legal system developed steadily in the direction of increasing legislative powers of the federal government. This expansion of federal power, associated with political and economic conditions of capitalist development, was in the legal context made possible by the peculiarities of the constitutional provisions concerning the powers of Congress and the broad interpretation of these provisions by the courts. Although the powers of Congress are, in a strict sense, delegated to it and are restricted by Article I of the Constitution, certain of the provisions contained in Article I, such as the inter-state commerce clause and the necessary and proper clause, have tended to expand the legislative powers of Congress and extend them over almost every socio-economic and political area of life in the United States. Since Congressional legislation is enacted on the basis of Congress' explicit or implied powers, such laws generally meet the criteria of Article VI and therefore qualify as "the supreme law of the land." In this respect federal laws, like constitutional provisions, treaties and rulings by the Supreme Court, are automatically entered in the law codes of each state as an integral part.

Under the supremacy clause as it is interpreted by the judiciary, a law passed by a state is automatically null and void if federal regulation of a sphere of activity is already so sweeping that a state legislature is unable to add to the regulations. A state law is considered invalid also if it af-

[1] McCulloch v. Maryland, 4 Wheat. 316, 436 (1819).

[2] *Congressional Quarterly's Guide to the U.S. Supreme Court*, Congressional Quarterly Inc., Washington, 1979, pp. 66, 81, 84.

fects a sphere where the political or economic interests of the federal government are dominant, or if the law will seriously impede the implementation of a federally-sponsored program.

These provisions present ample opportunity for Congress to legislatively encroach upon areas which have traditionally been regulated by state legislatures. To be sure, many students of American constitutional law not without reason view the federal powers within the framework of the supremacy clause as overtly contradicting the reserved powers of the states enumerated in the Tenth Amendment. It should be noted, however, that the centralist tendency in American federalism does not mean that the constitutional powers of the states are totally impinged upon. The preservation of the outward attributes of federalism and of a solid core of rights enjoyed by the states enables U.S. ruling circles to ensure flexible functioning of the capitalist state and to demonstrate the "vitality" of the American federation.

Early in the 19th century, the Supreme Court, in resolving the collision between Article VI and the Tenth Amendment, ruled that "it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends... That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained /under the supremacy clause/; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."[1] This principle was confirmed 10 years later by a court ruling in the License Cases.

The concept that states have "complete, unqualified, and exclusive" authority to legislate on issues of internal policy accommodated the demands of American capitalism in the 19th century and at the early stage of U.S. history was in full accord with the supremacy of the federal law. Yet, as monopoly and state-monopoly forms of capitalism grew, so too did the tendency of the federal government to expand the realm of its legislative activities as an element of the general process of centralization and concentration of political power in the federal government. The U.S. Congress began with increasing frequency to encroach upon the constitutionally protected domain of the state legislatures, invoking as license the very statutes of the Constitution. Over the last half century, the legal foundation of the "complete, unqualified, and exclusive" authority of the states has been

[1] New York v. Miln, 11 Pet. 102, 139 (1837).

considerably eroded by legislation enacted by Congress in social and economic spheres and by court decisions upholding such legislation. In various test cases involving disputes over labor legislation, social security and wage guidelines, the Supreme Court, citing the supremacy of the federal law and the powers of Congress to regulate inter-state commerce, has ruled that "the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character... If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[1] It is only the "attributes of sovereignty" of a state or its "essential governmental functions" that Congress has no right to impair.[2] Before the 1980s, the courts interpreted restrictively the concept of a state's "essential governmental functions."

The supremacy clause is thus instrumental in spreading Congressional authority to new areas of regulation and is one of many legal channels for the expansion of the powers of the federal government at the expense of the states.

The third paragraph of Article VI binds all executive and judicial officers of the states and of the federal government to take an oath that they support the U.S. Constitution. This provision was included in the Constitution to ensure the practical realization of the principle of the supremacy of the federal law: government employees, legislators and judges, in their capacity as executors, makers and interpreters of law, must correlate their activities above all with the federal Constitution and only then with any other statutes. An oath of allegiance to the Constitution has an underlying political meaning: by putting his hand on the Bible and reciting a solemn oath, the soon-to-be government official pledges his allegiance to the government system and laws established by the Constitution.

In assessing the balance between the states and the federal government within the American federation, it should be remembered that the federal government and the state perform certain duties in respect to one another which should be seen as a politico-legal mechanism ensuring the balance of the entire Union.

The Union in the person of its highest power bodies guarantees the territorial integrity of every state, meaning that the territorial boundaries of no state may be altered without that state's consent. There have been cases in U.S. history

[1] Maryland v. Wirtz, 392 U.S. 183, 196-197 (1968).
[2] National League of Cities v. Usery, 426 U.S. 833, 845, 852 (1976).

when new states were created out of the territory of already existing states. In 1792, for instance, the state of Virginia lost control over part of its territory which, with the consent of the state legislature, became the new state of Kentucky. And in 1796 North Carolina ceded part of its holding out of which emerged the new state of Tennessee. There were other similar cases, and each time the state legislature gave its express consent. Section 4 of Article IV establishes that "The United States shall guarantee to every State in this Union a Republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

Long ago Charles Sumner, a leading politician of the 19th century, pointed out that the guarantee clause is a "sleeping giant" as no other part of the Constitution gives "Congress such supreme power over the states."[1]

The Constitution does not explain what is meant by "a Republican form of government," which branch of the federal government is to make good this guarantee and how this guarantee is to be executed. The recorded debate on the draft of the Constitution indicates that the Founding Fathers, notwithstanding the vagueness of the constitutional formulations and the imprecisions in the legal techniques used, grasped rather clearly the type of political system they were creating. On the one hand, the guarantee of a republican form of government was, in the view of James Madison, needed "to defend the system against aristocratic or monarchical innovations," which was the aim of American colonists in the revolutionary war against the British crown. On the other hand, the form of government established by the Constitution was designed to obstruct the genuinely democratic participation of the people in government. Remarkably, in formulating Section 4 of Article IV, the Constitution's Framers wanted primarily to vest the federal government with effective power to suppress popular uprisings. They were spurred by the sheer panic they experienced following the rebellion of citizens of Massachusetts led by Daniel Shays. Madison cites this uprising as "among the ripening incidents preparing the way for the new Constitution." In a letter to Edmund Randolph in April 1787, he wrote: "An article ought to be inserted expressly guaranteeing the tranquility of the States against internal as well as external dangers."[2]

The Framers of the Constitution displayed political pragmatism in that they, without burdening themselves with a detailed description of what constitutes a republican form of government, clearly and unambiguously vested the federal government with the power to suppress rebellions against the government system created by the Constitution. In the rare cases heard by the Supreme Court dealing with the interpretation of Section 4 of Article IV, the Court has categorically refused to define the attributes of a republican form of government, stating that the issue was political and that the decision rests with the President or Congress.

Congress in effect has delegated the duty of safeguarding a republican form of government to the President as the commander-in-chief of the country's armed forces and as the Chief Executive. Soon after the adoption of the Constitution, the Act of February 28, 1795 was passed that authorized the President to use military force to suppress rebellions in any of the states. The decision of the President to use military force against popular rebellions is discretionary and is not subject to judicial review.

Legislation and political practice testify that the President, enjoying rather vast powers to protect the republican form of government from "domestic violence," has not hesitated to use them when the slightest threat to the American capitalist system has arisen in the states.

Under Section 331, Chapter 15, Title 10 of the U.S. Code, should a rebellion occur in any state directed against that state's government, the President may intervene on behalf of the state legislature or governor and move in the National Guard or Army to whatever extent he deems necessary for suppressing the rebellion. Section 332 of the Code grants the President the extra-constitutional power to deploy at his own discretion National Guard or Army units on the territory of any state when in his judgement the functioning of the government or the execution of laws has been illegally obstructed, when "illegal associations" emerge or a rebellion aimed against the federal government has flared up. In such a case the President may use military force to such an extent as he deems necessary for restoring order.

Under Section 333, the President, in using National Guard or Army units, or both concurrently, or any other means, may take whatever measures he deems adequate for the suppression in a state of a rebellion, domestic violence, illegal associations and conspiracies, should the latter obstruct the execution of federal laws or the administration of justice. Sections 3500 and 8500, Title 10 of the U.S. Code authorize the President to call up National Guard for active duty and to use it as deemed necessary in case of a rebellion or threat of a rebellion or of the inability of local authorities to ensure the execution of laws of the United States by "regular means."

[1] J.W. Peltason, *Corwin and Peltason's Understanding the Constitution*, pp. 96-97.

[2] David Hutchison, *The Foundations of the Constitution*, p. 229.

In the post-World War II period alone U.S. Presidents have invoked these powers on 9 occasions. In 5 of these instances, the President issued executive orders or proclamations to quell or forestall racial unrest. In 4 others, the President sent in Army or National Guard units at the request of the governor to quell mass violence or protest action.

Thus, the duty of the federal government to guarantee a republican form of government has in effect become a means of strengthening the centralistic tendencies in the United States.

The theory of American federalism assumes two other duties of the Union vis-a-vis the states. Each state is guaranteed equal representation in the Senate irrespective of the state's population, and this guarantee cannot be lifted without the consent of the states. Second, the federal courts do not have jurisdiction over cases involving suits against a state instituted by a citizen of another state or a subject of a foreign government. Such suits can be instituted only with the consent of the "sovereign," in this case the state.

The states also have several duties in relation to the federal government, which mainly concern election laws and the electoral system, and the obligation of the states to participate in the process of ratifying amendments to the Constitution.

2. POLITICAL TENDENCIES

American federalism of the last third of this century has little in common with the scheme of relations between the Union and the states molded by the Framers of the Constitution. Remarked American scholar Duane Lockard: "Strange as it sounds, in all probability the founding fathers were not believers in federalism as the twentieth century uses that term."[1]

Over the course of history, the balance of powers within the federal framework has sharply tilted in favor of the Union. Up to the time of the Civil War the federal government enjoyed significantly less powers than did the states. The federal government was preoccupied mainly with foreign policy and military affairs, leaving most issues of domestic policy to be dealt with by the state governments. Alexis de Tocqueville, the renowned French commentator on America, observed a century and a half ago that "The federal government scarcely interferes in any but foreign affairs; ...the governments of the states in reality direct society in America."[2]

[1] Duane Lockard, *The Politics of State and Local Government*, The Macmillan Company, N. Y., 1963, p. 73.

[2] Alexis de Tocqueville, *Democracy in America*, Vol. 1, Alfred A. Knopf, N. Y., 1945, p. 254.

With the turn of the 20th century began the rapid expansion of the federal powers, a process that reflects the fundamental laws of monopoly capitalism. It was met with unconcealed hostility by a considerable part of corporate interests who traditionally relied above all on state governments for protection. The National Association of Manufacturers, in one of its publications, declared: "The increasing concentration of political and economic control in the federal government is destroying the economic and governmental environment which is essential to the survival of the American system of free enterprise and to the preservation of the American constitutional system of a union of states. Unless the trend toward ever bigger government is halted, and until it is reversed, the states and private business alike face the prospect of ultimate, complete domination by the federal government. And complete federal domination *IS* totalitarianism."[1]

The main factor contributing to the strengthening of centralism is federal aid to the states to help them cope with local economic and social development programs. States receive from the federal government money in the form of subsidies, many of which are accompanied with rigid instructions on how the money is to be spent, a form of direct federal interference. By imposing conditions on the states for receipt of subsidies, the federal government can exert pressure on them. In some instances, the federal government circumvents state authorities, considering them unnecessary intermediaries in its relations with direct recipients of federal funds. It discourages states from participating in the implementation of certain programs, focussing instead on local authorities, opening the federal purse to them or to corporate recipients.

Federal allocations to aid state economies, agriculture, housing, medical care and social security are of key importance for the maintenance of living standards. At present, up to a third of state budgets are formed by federal subsidies approved by Congress within the framework of various aid programs to the states. However, social programs are being off-handedly cut to clear the way for inflated spending on military buildup plans and an escalation of the arms race. The Reagan Administration's economic program is designed around a cut in federal spending on social programs.

In any case, the federal government has at its disposal a number of economic levers by which it can regulate state activities.

The states attempt to resist encroachments by the federal government, but the means at their avail for doing so are

[1] Cited in Duane Lockard, *The Politics of State and Local Government*, p. 31.

rather limited and not very effective. State governments can sabotage the execution of those federal laws that they believe impinge upon their rights. Their legislatures can enact laws which they know are unconstitutional, reckoning that the federal judiciary will be slow to react.

A broadly used weapon of the states in their attempt to foil federal encroachment is the "interposition resolution," a legal device employed by state governments to make known to federal authorities their unwillingness to carry out a specific statute adopted by the federal government. Between 1956 and 1967, for instance, all the states of the Black Belt with the exception of North Carolina passed an interposition resolution thus sabotaging Supreme Court rulings on desegregation. Based on the interposition resolution, the states can pass a law, but that law, of course, may be judged unconstitutional by the federal judiciary.

Another often invoked device is the old nullification doctrine, according to which a state convention is theoretically able to declare null and void in that state any law of Congress or Supreme Court decision. The doctrine clearly contradicts the U.S. Constitution and is invoked mostly by reactionary interests which under the banner of fighting for states' rights oppose some liberal undertakings of the federal government.

The interposition resolution, the nullification doctrine and sometimes the declared right to secede are grounded in the utterly mistaken assumption that the Constitution is not the supreme law of the land but something akin to an international agreement under which the signatory states retain their sovereignty. Naturally, under the constitutional agreement, there can be no question of the states enjoying sovereign rights. They are subjects of the federation and enjoy only a measure of autonomy.

In the United States there have appeared in recent years various theories of federalism, such as "cooperative federalism," "horizontal federalism," "federalism without Washington," "new federalism" and "fiscal federalism," which are used in attempts to modernize the existing federal system. Most of these theories rest on totally idealistic pluralistic premises. Some authors see the solution of the existing situation in the strengthening of the position of the states, in ridding them of increasing control by the federal government—the richest superconglomerate in the United States. Various attempts are also made to reform the government of states and improve the structure and procedures of state legislatures, judiciary, etc. However, an effective solution to these problems has yet to be found.

Throughout the two centuries of its history the American federation has demonstrated time and again its ability to

adapt to changing circumstances. The present crisis of the federal system is a long way from being overcome, even though energetic measures are being taken for this.

The main flaw in the territorial-political organization of the U.S.A. is the growing contradiction between the economic-geographic and the federal structures. During the development of state-monopoly capitalism there have arisen large economic regions spread over the territory of several states. This process has been accelerated by the formation of such ugly offshoots of capitalist urbanization as agglomerations, megalopolises and conurbations, which prove to be virtually ungovernable. State borders, once fixed either arbitrarily or out of political considerations, no longer correspond to the contours of economic regions. With authority divided between federal, state and local governments, the system becomes less and less able to respond to constantly changing economic and social conditions. A critical situation has taken shape which up to now no kind of reforms has been able to defuse.

The American landscape today carries huge urban agglomerations the likes of Chicago, New York, Los Angeles and San Francisco which logically should become separate states since governing them has become extremely difficult. Proposals to that effect have been made repeatedly, and plans have been drawn up, but no action has yet been taken, mostly because of strong opposition by individual states, who, out of local considerations, do not wish to give up a part of their territory. The likelihood that such plans will be carried out any time soon is very small, since none of the states concerned would agree to such action. The almost solid guarantee of the territorial integrity of the states plays into the hands of local corporations and creates firm constitutional barriers in the way of plans to reform the federal structure.

The much discussed classical contradiction between the federal power and states' rights is not the cause of the crisis of the federal system but merely one of its manifestations. Attempts to reinforce states' rights, above all their fiscal authority, have not brought the desired results since they contradict the objective laws of the development of state-monopoly capitalism, which engenders the concentration of power, not its devolution. Harold J. Laski warned against this illusion decades ago: "Giant capitalism has, in effect, concentrated the control of economic power in a small proportion of the American people... For forty-eight separate units to seek to compete with the integrated power of giant capitalism is to invite defeat in every element of social life where approximate uniformity of condition is the test of the good life."[1]

[1] *The New Republic*, May 3, 1939, pp. 367, 368.

Within the system of American federalism, horizontal relations, or relations among states, are of considerable import. The Constitution rests on the states' certain obligations toward each other integrating them into a single whole. Section 1 of Article IV reads: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Before entering the Union, the states had their own, rather developed legal systems. Under the Tenth Amendment to the Constitution, they were allowed to establish their own judicial and law-enforcement institutions, to pass legislation and regulate by law the life in the state within the limits of their jurisdiction. This accounts for the existence today in the U.S. of the same diversity of legal standards and institution that were present in the colonial era. Strictly speaking, there is no "legal system of the United States" as such; there are 50 distinct legal systems plus the federal legal system.

The Framers of the American constitutional system, structuring it on a federal basis whereby the states would retain autonomy over legal affairs, foresaw the emergence of certain difficulties connected with the vast diversity of the American legal system. Hence the insertion in the Constitution of Section 1 of Article IV, whose primary purpose was, as a court ruling said, "to help fuse into one Nation a collection of independent, sovereign States."[1]

Section 1 of Article IV of the Constitution fixed the principle of comity in application of the legal acts of every other state. The clause is mainly concerned with civil suits (such as damage suits, divorce, alimony, guardianship and adoption, property claims, etc.) and the recognition of court decisions handed down in one state by other states. The principle of comity, or of "full faith and credit," extends to the laws and constitutions of the states. This principle works not only horizontally, between the states, but also vertically: according to the law and judicial precedent, the federal courts are also obliged to treat with "full faith and credit" the legal acts and court decisions of the states.

Comity of the states in legal matters has not, however, been observed to the point where this principle has become predominant; the states continue to give priority to local interests. The laws of another state are accorded "full faith and credit" only to the extent that they do not contradict local legislation. In some cases concerning this clause, the Supreme Court has ruled that if a defendant in a court case cites the laws of another state or of a foreign government to

[1] Toomer v. Witsell, 334 U.S. 385, 395 (1948).

support his position, the court is not automatically bound to observe the "full faith and credit" clause of the Constitution and waive the priority of the laws of its state, but must weigh the overall interests conveyed in the laws of the two states and decide accordingly.

Guided by the Constitution, Congress has incorporated into current legislation several statutes that somewhat clarify the principle of comity and spell out the procedures for establishing the authenticity and legal force of laws, documents and court proceedings of one state on the territory of another. In principle, Congress enjoys potentially unlimited power to unify legal systems of the states. Hypothetically, Congress could impose, for instance, specific conditions and procedures for the dissolution of marriages and make this law mandatory for all states. Late last century a commission was set up in Congress charged with the drafting of uniform legislation. It submitted more than 120 proposals for uniform legislation in a broad range of legal areas. Only a few of these proposals were passed by the states. There are other organizations pushing for uniform legal codes for the states, including professional associations of lawyers, the American Law Institute, the Institute of Judicial Administration, etc. Yet many of the reforms aimed at creating uniform legislation for the states and drafting uniform standards in various areas of the law have not been adopted because of active opposition by those bourgeois groups who under the slogan of "sovereign states' rights" are out to protect their selfish political and economic interests.

As a result, federalism in the legal realm is characterized by localism and diversity of legal standards. In the United States as a whole there is a clearly localist attitude to the enforcement of laws: standards for upholding legality vary from state to state and from county to county depending on local pressures and the political climate of that region. Localist attitudes to law enforcement often foster outright lawlessness. A situation has emerged in the country that is at odds with the much hailed ideal of "equal justice for all" and the commonly recognized principle of uniform justice.

Horizontal relations within the American federation are effected by means of agreements and compacts concluded by the states with one another. Scholars note the low effectiveness of such relations, the poor contacts between government agencies of different states and other shortcomings. They recommend broad federal involvement in the negotiation and execution of inter-state agreements, which would indisputably promote the further centralization of the American federation.

In the United States there exists a range of permanent advisory bodies, part of whose mission is to coordinate the settle-

ment of statewide and inter-state disputes. Also, conferences of state governors are held annually. The Council of State Governments, the most important body in the area of inter-state cooperation, founded in 1935, provides assistance to states in improving legislative, administrative and judicial practices and mediates in disputes between states or between the states and the federal government. Its stated mission being to better inter-state relations, the Council works in close co-ordination with such organizations as the National Governors Conference, the National Legislative Conference, the National Conference on Inter-state Trade Barriers and the National Association of Juvenile Compact Administrators.

The state governments are modeled after the federal system of separation of powers supplemented by the mechanism of checks and balances. The traditional threesome (the legislative, executive and judicial branches) has been copied by all the states and corresponds to the state legislature, governor and state Supreme Court. In the states, relations between the three branches are regulated by nearly the same principles that regulate the relations of the federal branches, though with certain changes.

Formally, the state legislature is considered the dominant branch. Made up supposedly of representatives of the people, the state legislature theoretically possesses powers that in a certain respect allow it to control the other two branches of government. In reality, however, there is a certain tendency in the states toward centralization, manifested in the dominance of the governor.

The organizational principles of the state legislatures vary little from state to state since most states simply adopted those of Congress. All state legislatures with the exception of Nebraska's are bicameral. Bicameralism, at one time embraced without much thought, has lately come under heavy fire from various breeds of reformers, who in their writings point out its increasingly striking flaws. They note in particular that bicameralism distorts the principle of equal representation, creates ample opportunities for various types of machinations by pressure groups and for behind-the-scenes deals, that it drags out and befuddles the legislative process, breeds bureaucracy and thus obstructs the enactment of vital legislation, and, lastly, that it is archaic and expensive.

In the strict context of the Constitution, state legislatures enjoy the powers reserved to the states by virtue of the principle of dual federalism. Many state constitutions place additional limits on the powers of the legislature. For instance, they may not perform divorce proceedings, issue licenses for the holding of lotteries, enact local or special laws, alter the boundaries of a county without approval by voters or pass bills

of attainder or laws that defy the federal Bill of Rights.

The actual powers of a state legislature, however, are determined not just by that state's constitution but also by its relationship with the governor when exercising power. In the legislative sphere the governor and his administration command a number of effective means for pursuing their legislative programs. Although state governors lack the power of legislative initiative, they themselves often shape key legislation. The governor's relationship to the legislature is not that of the chief administrator who executes the laws, but that of a political leader who shapes legislation. This role of the governor is generally acknowledged, yet not all legislatures are willing to silently accept this.

The governor's powers are even greater over budgetary matters, although formally the legislative branch has been granted full control over this area. State budgets are drawn up by the governor and his administration, with the legislature's role limited to approving them. The picture is the same here as in the federal government, only on a smaller scale.

The office of state governor as it functions today in the 1980s is the result of a lengthy evolution. Initially, when the first state constitutions were being adopted, governors were seen as nothing more than the nominal heads of state administrations. They performed a large share of ceremonial functions while the state was run by legislators and elected administrators. The limited role imposed upon state governors reflected the historical fear of the tyrannical powers exercised by colonial governors. It was not until the United States' passage into the era of state-monopoly capitalism that the office of governor began to increase in importance.

By type of government the states can be likened to small presidential republics. The governors enjoy roughly the same powers as does the President, but their position within the state administration is much weaker. This is mainly because, in addition to the governor and lieutenant governor, there are a number of other officers in the state who receive their mandate directly from the voters, such as the secretary of state, state treasurer, attorney general, auditor and comptroller. Unlike federal cabinet members, state officers are not subordinated to the Chief Executive and enjoy effective independence. This arrangement dilutes the status of the governor and, what's more, fosters duplication and confusion in the administration of state government. The situation is compounded by the proliferation of independent agencies whose activities are outside the control of the governor and legislature. The critical situation in the states is often referred to as a "crisis of management."

State administrations have proved poorly equipped to cope with the constantly mounting flow of administrative work. As

a way out, attempts have been made at greater centralization of the state apparatus and its closer alignment with the constantly changing federal model as a cure. The total reorganization of state administrations in the direction of centralization has resulted in such an increase of governors' actual powers that drastically alter their role in state government. Decentralization is everywhere supplanted by rigidly centralized leadership. In this respect the political systems of the federation and the states have been made uniform.

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The present crisis of the American federation can be observed in the system as a whole and in the mechanism of government in the states. Hence, the dual approach to reform.

First, the incompatibility of state borders with economic and demographic boundaries is becoming increasingly evident, prompting the frequent proposals for dividing the country into large administrative regions. Going ahead with such reforms would mean the transformation of the United States into a unitary state comprised of administrative divisions trusted with very limited powers. Similar reforms are aimed at subduing the particularism of the states and giving greater sway to the principle of centralism.

Second, moderate reformers seek merely to improve the existing arrangement of government in the states and bring the relationship between the states and the federal government in line with modern conditions. Proposals for more radical changes are forever blocked by local corporate interests and by apathy on the part of the public, who have totally lost faith in any proposals advanced by the leading bourgeois parties.

The crisis of American federalism is not an isolated event. It should be regarded as an integral part of the crisis of the entire U.S. political system, brought on by the current situation of state-monopoly capitalism. Attempts by liberal reformers to find a way out of the crisis through the expansion of states' rights are utopian. Alterations in the administrative apparatus of the states might yield certain improvements, but do not solve the central problem. Proposals to radically alter the structure of the federal government through streamlining and centralization are likewise unrealistic, for the federal administration lacks the constitutional tools needed to dismantle particularism.

The American federation as it exists today is a long way from that "more perfect Union" promised by the Founding Fathers to future generations of Americans in the Preamble to the Constitution. The Union is torn asunder by conflicting tendencies, of which the tendency toward centralization, an inalienable companion of capitalist government, is dominant.

Chapter 3

JUDICIAL REVIEW UNDER THE AMERICAN POLITICAL SYSTEM

Judicial review as practiced in the United States is a typical American phenomenon. Its essence is the power of a court, at the petition of a party, to declare a law or administrative act applied in the case unconstitutional; all laws that are declared unconstitutional by a court automatically lose their legal force and become invalid. This type of constitutional review allows the judicial branch to control rather effectively the other two branches of government, for most of the laws passed by Congress or ensuing from the President can be challenged in a court to verify their constitutionality.

Constitutional judicial review (not mentioned anywhere in the Constitution) evolved from the spirit and ideas of American constitutionalism. It firmly embedded itself in the political and legal fabric of the United States, becoming simultaneously an effective political tool of the ruling elite and a much vaunted symbol of the embodiment of the ever wavering ideals of constitutionalism.

American political scientists point out that "The American Constitution of 1787 was a pragmatic document, arising out of the experiences—and hopes—of the framers, many of whom were, or had been politicians. Yet this document, which established a model of compromise and accommodation that has structured American law and politics to the present, soon took on the aura of divine inspiration. It became a symbol of political virtue, and its appeal has improved with age. One result of its almost mystical aura is that judges are invested with a special responsibility to defend the constitutional system as they see it, and with a special legitimacy when they act in this role."[1]

Judicial review in the United States has become a powerful means for adapting the Constitution to the constantly changing political and socio-economic conditions of capitalist society and a pointed weapon wielded by the courts to exert influence on the legislative and executive branches and thereby on the overall political process. In perhaps no other country does the judicial branch possess so much latitude to shape the

[1] Peter K. Eisinger et al., *American Politics. The People and the Polity*, Little, Brown and Co., Boston, 1978, p. 151.

political climate of society. American courts often act as political arbiters in areas of life that in other countries are considered the exclusive domain of legislative bodies or of executive institutions. "The story of government in America," writes former U.S. Attorney General Ramsey Clark, "of how we solve our pressing social problems, has been told in large measure through lawsuits. Sooner or later most of our critical issues and social tensions find their way to court for resolution. When the power of government impinges on the rights of the individual, judicial action is inescapable."[1]

To be sure, the judicial branch and its highest body, the U.S. Supreme Court, exert influence over policies through specific legal channels that reflect the distinct traits of American constitutionalism and government and its historical development. The judicial branch and its most effective weapon for influencing the affairs of society, constitutional review, rely on a specific organization of the judiciary.

1. CONSTITUTIONAL FOUNDATIONS OF THE AMERICAN JUDICIAL SYSTEM

The federal Constitution of 1787 outlined only in very general terms the powers and organizational structure of the federal judicial branch. Section 1 of Article III, for instance, establishes that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

What is understood by "judicial power" is not revealed anywhere in the Constitution, and the matter of how the federal court system is to be organized is left entirely to the discretion of Congress, which may create whatever federal courts inferior to the Supreme Court it deems appropriate.

The absence of specific constitutional guidelines for structuring the federal court system can be traced to the Constitutional Convention in Philadelphia, where advocates of states' rights opposed the creation of an independent federal court system, fearing that the rights of state courts would be impinged upon. Yet everyone recognized that a kind of national structure was needed. Alexander Hamilton, one of the Founding Fathers, noted that the main defect of the Confederation was "the want of a judiciary power. Laws are a dead

[1] Ramsey Clark, *Crime in America*, Simon and Schuster, N. Y., 1970, pp. 210-11.

letter without courts to expound and define their true meaning and operation."[1] The Articles of Confederation did not provide a direct means for implementing laws enacted by Congress, which meant that Congress had to appeal to state courts to have its enactments implemented. What's more, without a federal court system, the first U.S. Attorney General, Edmund Randolph, pointed out, Congress could not cause "infractions of treaties or the law of nations to be punished."[2]

Out of a debate at the Convention between the supporters and opponents of a strong federal judiciary emerged a compromise decision to insert in the Constitution provisions for the establishment of a Supreme Court and a clause allowing Congress to create inferior courts at will.

The establishment of a federal court system vested with authority over the administration of justice was urgent politically and in many ways necessary for the survival of the newborn republic. Consequently, the first legislative act passed at the first session of Congress was the Judiciary Act of 1789, which established a system of federal courts as well as federal prosecutors' offices. The country was divided into 13 federal court districts (later expanded), in each of which was established a federal trial court. The Act also created 3 courts of appeals to deal with controversial decisions handed down by the federal trial courts. Decisions by federal courts of appeals can be contested only before the Supreme Court.

The Judiciary Act of 1789 thus established a three-tier court system. In legal doctrine, the three levels of courts—district, appellate and the Supreme Court—are known as constitutional since they were established by Article III of the Constitution. Later, as the American government evolved, Congress, invoking its power to create inferior federal courts, established new courts and revamped the structure of already existing ones. Some of the later-appearing courts were referred to as legislative courts, since they were established by Congress by virtue of Section 8 of Article I, and not under the authority of Article III. According to Section 8, Congress may create any lower federal courts it deems necessary and proper for the execution of its powers. Courts classified as legislative are empowered by Congress to resolve disputes in specific areas of law. Judges of such courts, unlike judges of constitutional courts, do not enjoy lifetime tenure and their salary is not exempt from reduction.

Throughout American history various types of legislative courts—from tax to customs to claims courts—have been established and reorganized. The Supreme Court defined their

[1] David Hutchison, *The Foundations of the Constitution*, p. 202.
[2] Ibid., p. 201.

status as follows: "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited... They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."[1]

Many of the institutions established by Congress in pursuance of Section 8 of Article I of the Constitution, with quasi-judicial functions conferred on them, are administrative agencies like the Federal Trade Commission and the National Labor Relations Board. This partial merging of the functions of the different branches of government is a departure from the classical model of separation of powers embedded in the Constitution. It is important that quasi-judicial institutions in the United States regulate vital areas of public and economic life.

Several legislative courts have been made into constitutional courts by Supreme Court decisions and acts of Congress. Therefore, the division of courts into legislative and constitutional is only relative and can be of no more than theoretical interest. What is typical of the development of the U.S. court system is that many courts were created quite unsystematically. Every time Congress thought it necessary and expedient to establish one, it did so without showing particular concern about whether the newly created court fit smoothly into the workings of the judiciary as a whole or whether its powers were logically defined.

The federal judiciary in the United States is in no way intermeshed with the state judiciaries and exists parallel to them, an example of American federalism at work. Although the Constitution did provide for the judicial power of the United States to be exercised by the Supreme Court and lower federal courts, this power was restricted to cases of federal jurisdiction, and by virtue of the Tenth Amendment to the Constitution, every state is reserved the right to establish its own judiciary (to decide cases within its jurisdiction), since the relevant clauses in the Constitution concern only the federal judiciary. As a result, in the United States unlike in many other countries there is no single judicial system but 50 independent state judiciaries and a separate federal court system.

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[1] American Ins. Co. v. Canter, 1 Pet. 511, 546 (1828).

What's more, neither the Supreme Court nor other institutions within the federal court structure exercise any kind of administrative control over the state courts. Special agencies within the federal judiciary exercise organizational guidance over the federal courts. One, the Administrative Office of the United States Courts, deals with administrative and financial issues. The function of the second, the Federal Judicial Center, is to coordinate the activities of the federal courts, to carry out research, and to provide continuing legal education for federal judges. Similar agencies operate in several states to provide guidance to state courts in organizational and financial matters. In some states no such agencies exist. Yet in all instances the state judiciaries are organizationally totally independent of the federal courts, including the Supreme Court of the United States. Many American legal experts believe that the vast diversity of totally independent court systems and the absence of centralized guidance over them invite chaos in the organization of the judiciary.

The federal judiciary is currently represented by three types of courts—district, special and appellate—with the Supreme Court at the top.

U.S. district courts are federal courts of general jurisdiction that hear cases involving federal legislation which are outside the jurisdiction of special courts. Each U.S. district court functions within a federal court district, of which in each state there may be anywhere from one to four, depending on the size of the population of the state. All told, there are 94 federal court districts in the United States. Similar to the district courts are the territorial courts established in Puerto Rico, Guam, the Virgin Islands and the Mariana Islands. They have jurisdiction over not only federal cases but also suits arising out of local law. Territorial courts are classified as legislative courts, their judges appointed for specific terms of office. The district court of Puerto Rico is an exception, having been made by Congress a "constitutional" court.

Among the federal special courts are the U.S. Claims Court, which settles financial and property claims against the government, the U.S. Court of International Trade, which reviews disputes involving customs and imports operations, the U.S. Tax Court, the U.S. Court of Appeals for the Federal Circuit, which hears appeals of Claims Court decisions and also complaints brought against decisions by government agencies such as the patent bureau, and the Temporary Emergency Court of Appeals, which reviews appeals of decisions by district courts concerning the enforcement of "economic stabilization" laws.

Appeals of decisions made by U.S. district courts or a federal special court and appeals of decisions issued by a federal administrative agency are taken to one of 12 existing U.S.

courts of appeals, each functioning within a specific circuit. They are positioned between federal trial courts and the Supreme Court in the judicial hierarchy.

The highest court in the federal judiciary is the Supreme Court. Its composition, structure and functions were not spelled out by the Constitution. Section 3 of Article I mentions a Chief Justice, and Section 2 of Article II confers on the President the power (with the advice and consent of the Senate) to appoint "judges of the Supreme Court." Under the Judiciary Act of 1789, the Supreme Court, founded Feb. 2, 1790, was to be made up of a Chief Justice of the United States and five Associate Justices. The composition of the Court fluctuated between eight and ten justices until 1869, when Congress permanently fixed the membership at its current level of nine, counting the Chief Justice. This composition was confirmed by later legislation.

The number of judges for each of the other federal courts is fixed by Congress, depending on the work load of the court, the type of cases it hears, the size of the population in the court district, etc.

Researchers, while describing the structure and functioning of the U.S. government, if they at all discuss the place and role of the judiciary in the political process, usually confine themselves to the Supreme Court and its watchdog powers which enable the Court to speak authoritatively on political issues. But given the pluralism of the U.S. political system and its federal structure of the government, stock should be taken also of the activities of local courts, especially as concerns their influence on local politics. At the state court level, a large number of cases are resolved conclusively that involve issues of vital concern to average Americans. Such cases may range from labor disputes to conflicts between wealthy creditors and financially strapped debtors to challenges of illegal actions by administrative or police agencies. In many instances persecution of opposition movement leaders who are charged with violating state laws is organized at the state court level. This is one explanation why the financial elite and their men in the major political parties try to retain the courts under their influence, and why the impartial administration of the law, as so often happens, falls victim to political interest.

The political role of local courts is clearly visible during the resolution of conflicts and disputes arising not only out of class confrontation, but also out of rivalries between local leaders of the major parties. Whatever issues are brought before the courts by local politicians, the majority of them can be classed under a single heading—Democrats v. Republicans (or vice versa) for Power and Influence in the County. Using the powers that allow them to keep watch over whether laws or executive decrees conform to the state

constitution, the courts can significantly amend the activities of state administrations. The legal basis for the functioning of political institutions also depends in large measure on the nature of court decisions. The way in which courts interpret state legislation concerning, for instance, the rules and procedures for holding elections to local and state offices often provides them with an opportunity to influence the course of elections and even determine their outcome.[1]

Judges can influence politics outside the courtroom also. The laws of some states allow state officials to call on judges for advice. Judges in effect participate in the decision-making process by studying issues and reporting their conclusions to members of the legislature and the governor, and also by attending government meetings or sessions of the legislature and its bodies and offering their recommendations on various issues.

The organization of the judiciary in each state differs, reflecting a diversity that goes back to the colonial days, when each of the independent governments developed its own legal standards reflecting the parochial approach of the pioneers to the establishment of a system of courts in isolated settlements and conforming, above all, to the communications and transport facilities available. "Courts need to be close to be convenient, and the result was widespread adoption of the justice-of-the-peace system to provide courts on a neighborhood basis. At the next higher level courts tended to be established with relation to the distance a man could travel in a day on horseback."[2]

The U.S. Constitution reserved for each state the right to establish within its territory whatever judicial institutions it deemed necessary, which contributed to the present diversity of court systems in the states. The establishment of courts on the neighborhood basis promoted the widespread appearance of courts and judicial bodies conferred with various jurisdictions and titles.

For all the diversity in their structure, state judiciaries have features in common. By type of jurisdiction, the courts can be divided into three groups: limited and special jurisdiction, general jurisdiction, and appellate jurisdiction. The first two groups are courts of first instance. The third group covers intermediate courts of appeals and supreme courts.

Local courts of limited or special jurisdiction, the lowest rung in the hierarchy of state judiciaries, are known under a variety of names, such as justices of the peace, police courts,

[1] See James Eisenstein, *Politics and the Legal Process*, Harper and Row, N. Y., 1973, pp. 258-300.

[2] Walter F. Murphy, C. Herman Pritchett, *Courts, Judges, and Politics. An Introduction to the Judicial Process*, Random House, N. Y., 1974, p. 60.

or municipal courts. What unites them is that their jurisdiction is limited to small claims and minor criminal cases. Proceedings of local courts are not recorded, and if the decision is appealed, the case is transferred to a general jurisdiction court where it is tried *de novo*.

The powers of special jurisdiction courts are limited to a specific category of cases. This group includes juvenile courts, domestic relations or family courts, probate courts, traffic courts and certain others.

General jurisdiction courts go by various names, but are primarily known as superior or district courts. As courts of first instance, they deal with criminal and civil cases of a more complex nature than those brought before local courts, and review appeals of decisions handed down by lower courts. In several states general jurisdiction courts also handle juvenile cases, probate suits, family relations cases, etc.

Appeals of decisions handed down by general jurisdiction courts are heard either in the state Supreme Court or by an intermediate court of appeals. In those states that have intermediate courts of appeals, it is only upon their decision that cases are reviewed by the Supreme Court of the state. Where they have none, appeals go directly to the state Supreme Court, the court of last instance, as a rule, for suits in which state laws are involved.

Notwithstanding the wide dispersion of jurisdiction among different courts, collectively the jurisdiction of state courts is quite impressive, for overall state laws regulate a much larger range of activities than do federal laws. In civil law, state courts adjudicate suits based on the laws of the given state as well as of other states, and also hear suits brought on the basis of federal legislation. Most of the majority of the criminal cases brought to court in the United States are prosecuted under state criminal laws, which explains why local courts in the states hear the lion's share of criminal cases. The lower courts in the states are so overburdened with a mounting backlog of cases that many American students of the courts have begun to talk of a crisis. The President's Commission on Law Enforcement and Administration of Justice pessimistically reported in the mid-1960s that "No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts."[1]

Indeed, the awkwardness and backwardness of some of the units within the judiciary, the buildup of a large backlog of criminal cases, delay and the assembly-line methods of processing cases that go with it all help to bring about a

[1] *Task Force Report: The Courts. The Task Force on the Administration of Justice. The President's Commission...*, U.S. Government Printing Office, Washington, 1967, p. 29.

situation where the criminal justice system is no longer able to cope with its duties, breeding injustice. Yet those on the right attribute the crisis to what they term "liberalism" and "leniency" of judicial policies, reproaching judges for spending too much time on "minor points," such as determining whether the defendant's procedural rights were violated or whether the police acted properly, and not enough time on their main function—determining whether or not defendant is guilty. In other words, judges are accused of giving excessive attention to "legal technicalities." Proceeding from this position, critics of leniency in the courtroom propose several changes which in their opinion would improve the criminal justice system. They propose, among other things, speeding up the flow of cases through simplification of court procedures. This would most likely weaken the legal guarantees of the justice system. Such proposals are not only incapable of rescuing the criminal justice system from the state of crisis brought on by an entire web of socio-economic problems and contradictions in capitalist society, but will also unavoidably lead to the erosion of the constitutional guarantees of justice and individual rights.

The subject jurisdiction of the Supreme Court and of federal (constitutional) lower courts is defined in Section 2 of Article III of the Constitution: "1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States, between a State and citizens of another State;—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Early in the 19th century the Supreme Court, in *Cohens v. Virginia*, divided the "cases" and "controversies" cited in Section 2, Article III, into two categories.[1] This division has remained in effect in American constitutional law to this day.

The first category is identified by the nature of the cases,

[1] *Constitutional Law. Cases and Materials*, pp. 15, 39, 46, 1595, 1600, 1604.

irrespective of who is party to the case. Such are cases arising under the Constitution, federal laws, foreign treaties, and also all cases of admiralty and maritime jurisdiction.

The second category is based on who is party to the case. It covers the cases to which the federal government or a state is party[1]; controversies between citizens of different states; cases involving foreign ambassadors, consuls or other officials of a foreign government accredited in the United States; and those between citizens of the same state claiming lands under grants of different states. (The latter clause was included in the Constitution due to the rapid seizures and settlement of Western territories. The Northwest Ordinance passed by Congress in 1787 regulated land grants and the formation of new states, eventually making the clause meaningless.)

While appraising the jurisdiction of U.S. federal courts it should be kept in mind that it is limited in the sense that federal judges hear only cases arising out of federal law, that is, acts of Congress, whose legislative powers are limited to those enumerated in Article I of the Constitution. In enumerating the powers of the federal government, including those of the judiciary, the Founding Fathers purposed to protect the powers and prerogatives of the states.

The jurisdiction of federal courts therefore extends only to a relatively narrow range of cases. In criminal cases, the federal courts have exclusive jurisdiction over all "crimes against the United States," that is, those prosecuted under federal criminal laws (Title 18 of the U.S. Code). Although such crimes are looked upon as a threat to national interests (among the approximately 200 federal crimes are treason, espionage, robbery of banks and post-offices, smuggling, federal tax evasion, kidnapping for ransom and drug trafficking), their share among overall criminal cases heard in the nation's courts is tiny: according to one study, 99 percent of all criminal cases in the country are tried in state courts.[2]

In civil law the exclusive jurisdiction of federal courts extends, for instance, to suits arising under admiralty and maritime laws, suits against the United States government, controversies over patents and copyrights or bankruptcy laws, or suits involving a state (with the limitations imposed by the Tenth Amendment) or a foreign diplomat. In most civil cases involving a controversy between citizens of different states ("diversity of citizenship cases" in constitutional law), the jurisdiction of the federal courts and the state courts overlaps, in which case the parties to the controversy may

[1] A private person's, or even a foreign government's chances to sue a state as a sovereign entity were considerably curtailed by the Eleventh Amendment.

[2] Peter K. Eisinger et al., *American Politics*, p. 160.

choose between the U.S. district court and a state court located within the district. Under the law, it is only the cases involving claims of more than 10 thousand dollars that are heard in a federal court; those for lesser sums go to state courts. However, should both parties to the suit desire, a case may be transferred to a state court, even if it involves more than 10 thousand dollars.

There also exists a certain overlap of jurisdiction of the federal and state courts over the prosecution of criminals. A person tried in a state court for an act prosecutable under state law may also be brought to trial a second time in a federal court if the act includes an offense punishable under federal law. Despite such practice being in clear violation of the Fifth Amendment provision of the Constitution making it illegal to prosecute a person twice for the same offense, the Supreme Court has not declared this practice unconstitutional, but rather, has upheld its legality, citing the "sovereign powers" of the states and the federal government. And although federal legislation contains a number of clauses prohibiting a person convicted for an offense in a state court from being retried in a federal court, this issue has all but been left to the discretion of federal prosecutors.

The overlap of jurisdiction of federal and state courts over criminal cases often lends a degree of flexibility to the way government penal policies are executed: when called for by political considerations, the focus of political repression can be shifted onto state courts and law-enforcement agencies. Persecution of opposition movement leaders is arranged locally, on the basis of violation of state laws, thus allowing the federal authorities, far removed from the case, to save face. As one American observer put it, "In the absence of higher level 'legal repression,' intimidation and abuse of authority by the lower officials is not condoned. To carry it out, members of the lower law enforcement echelons are forced to resort to secrecy, truth-stretching, outright lying, or even perjury... There are the statutes most commonly used in 'police brutality' cases, where an officer of the law abuses his position and illegally acts as the tormentor of the citizen rather than as his prosecutor... The system has thus allowed its lower level members, including the police and the police courts and municipal courts, to punish unpopular citizens, while the upper echelons of the system in the executive, judicial, and legislative departments can earnestly believe, or at least make others believe, that the system affords liberty and justice for all."[1]

[1] Harvey A. Silverglate, "The 1970s: A Decade of Repression?", *Criminal Justice in America. A Critical Understanding*, ed. Richard Quinney, Little, Brown and Co., Boston, 1974, pp. 128, 130.

The clauses of Article III of the Constitution indicate that the jurisdiction of the federal courts is defined rather precisely and unequivocally. Yet, these same passages fail to define the very notion of "judicial power" and carry no mention of judicial review. Before we begin to explore this issue, we first need to focus on a key aspect of the functioning of the judiciary and one of the chief attributes of constitutionalism—the principle of independence of the judiciary.

2. INDEPENDENCE OF THE JUDICIARY AND THE APPOINTMENT OF JUDGES

Although the Constitution makes no explicit mention of the principle of independence of judges, Section 1 of Article III establishes that federal judges shall hold their offices "during good behavior" and their salaries "shall not be diminished" during their continuance in office. By making continuance in office conditional on these terms, the Founding Fathers aimed to assert the independence of judges and insulate them from the caprices of Congress and the President. The stipulation "during good behavior" means virtually life tenure in office. Federal judges of all levels are appointed by the President "with the advice and consent" of the Senate and can be removed from office only by Congress and only by impeachment for a crime or a gross violation of ethical standards.

The irremovability of federal judges, their relatively high and steadily growing salaries and the enormous prestige they enjoy do indeed give rise to circumstances under which they can demonstrate independence. Removed from pre-election politics and not having to fear a loss of job, a federal judge, should he desire, can disregard considerations of politics and the interests of legislators or the Administration in a politically charged area of law and justice. Within these limits, the principle of formal independence of federal judges has become firmly embedded in U.S. government and political system, enough so that American politicians readily concur that exerting the least bit of pressure on judges will end up doing more harm, both legally and politically, than good. In their much-talked-of book detailing the inner workings of the Supreme Court, Bob Woodward and Scott Armstrong describe instances in which Supreme Court justices disqualified themselves from a case after an interested party tried to discuss it with them.[1]

An assessment of the extent to which the independence of judges is observed in the United States would be incomplete

[1] *The Brethren. Inside the Supreme Court*, Simon and Schuster, N. Y., 1979, pp. 79-85, 148-49.

without taking into account two circumstances.

First, the independence of judges has become somewhat overblown. In the United States like in no other Western country, the judicial branch gets caught up in the turbulence of political and public debate and exerts considerable influence over policy-making. This influence is exercised in the form of judicial review of all laws and regulations issued by the legislative and executive branches. While discussing the influential role played by the U.S. Supreme Court in the government machinery, most law scholars and political scientists would not hesitate to note the paradox of an arrangement under which the activities of elected government institutions accountable—at least nominally—to the electorate (Congress, the President and his Administration, state governors and legislators, and local officials) are in effect controlled by an institution founded on markedly undemocratic principles. For indeed, the Supreme Court is made up of nine people selected from among the elite of the legal profession and appointed for life terms; judges are accountable to nobody in the execution of their office, do not report to anyone and are not subject to re-election. Even senility or the inability to make decisions are not sufficient grounds for their removal from office. In the event that the policies of the President and the ruling party diverge sharply from the course pursued by the judicial branch, "it is particularly difficult to overcome the resistance of the Supreme Court," wrote Russian historian P.G. Mizhuev. And he added ingeniously that the President was left but one resource—"to wait for all of the members of the Supreme Court to die off."[1] In the 1930s President Franklin D. Roosevelt complained of the "nine old men" of the Supreme Court who blocked his liberal reforms and "were going too far in defending property rights and thwarting the will of the voters."[2] Anthony Lewis, in a foreword to a monograph on the Supreme Court, notes that "we give the last word to nine judges, appointed with life tenure, responsible to no electorate... That is the great paradox of the American system."[3] Under American conditions, independence of federal judges results in their unaccountability and free discretion, thus lending this democratic principle an undemocratic savor.

The second circumstance that needs to be kept in mind in assessing the principle of independence of judges is that judges are indirectly linked to politics. The Constitution does

[1] P.G. Mizhuev, *History of the Great American Democracy*, St. Petersburg, 1906, pp. 118, 119 (in Russian).

[2] Karl W. Deutsch, *Politics and Government. How People Decide Their Fate*, Houghton Mifflin Co., Boston, 1974, p. 328.

[3] Alexander M. Bickel, *The Supreme Court and the Idea of Progress*, Yale University Press, New Haven and London, 1978, p. vii.

not specify any formal qualifications for judges such as age, citizenship or residence requirements as it does for Presidents and members of Congress. In practice, however, judges have close connections—either through friends, relatives or political party membership—with the ruling elite, gravitating toward a particular pole of its ideology. The executive branch, well aware of the potential and real power of the judiciary to affect events in the country, tries to use the maximum available means to sway judges to support Administration policies. In doing so, it resorts to means enabling it to legitimately set the direction of judicial policy. One such means is the constitutional right of the President to appoint, with Senate approval, federal judges. Since judicial policy is shaped by the actions and decisions of particular individuals (at the federal level there are 750 judges, with vacancies occurring infrequently), the Administration is very meticulous in selecting candidates to fill vacancies, with each candidate a product of the Administration's partisan selection process.

Presidents usually select for federal judgeships those whose ideology conforms to the policies of the ruling party and on whom they can rely not to create obstacles to Administration programs. Federal judges are selected from among the most authoritative, influential and, by all means, politically active members of the legal profession. These may be persons of the same party of the President or from among his friends. "In about three-fifths of the 134 nominations they had made to the court /the Supreme Court/ to mid-1970, Presidents had personally known candidates."[1]

During the two terms in office of President Eisenhower, a Republican, 92.5 percent of those he appointed to the federal bench were Republicans, evening the imbalance created by the 20 years of Roosevelt and Truman, who had appointed 95 percent and 91 percent Democrats respectively and who were themselves merely following in the tradition of Harding, Coolidge and Hoover—95 percent, 92 percent and 82.7 percent partisan respectively. President Kennedy filled more vacancies in 16 months than Presidents Hoover, Coolidge and Harding had all combined. Additional vacancies were opened. All told, Kennedy nominated 128 people to the federal bench, 91.2 percent Democrats.[2]

The Administration of Richard Nixon, who attached great significance to judicial support for his tough "law and order" campaign, stacked the Supreme Court and the federal bench with loyalists of conservative ideology. President Jimmy Carter, despite his declarations regarding the need to "depoliticize" the judiciary, followed in the tradition of his predecessors by nominating to the federal bench only Democrats, claiming that the grounds were their high professionalism.

The weight of political considerations on the selection of candidates for federal judgeship is, of course, carefully masked, for it is at this level that issues of law affecting the entire nation are decided. For instance, the 1980 Republican Party Platform stated the intention of the Reagan Administration to appoint to the federal bench "women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens."[1] Behind these nebulous and seemingly decorous assertions is a relatively unsophisticated credo of the conservatives: the judicial branch must pursue an unwavering course of strengthening law and order and shield the ideals and beliefs of Americanism from the rot of liberalism. It was for this reason that in 1981 the Justice Department issued an order requiring that nominees for federal judgeship vacancies could be selected only from a list of candidates proposed by Republican Senators. The first time in the history of the United States a ruling party has publicly stated its intention to fill the independent judiciary with people who meet the political standards of the Administration.

In 1985 G. Calvin Mackenzie directed a study of federal appointments under the Reagan Administration for the nonpartisan National Academy of Public Administration. Mackenzie concluded, "Nobody has played the appointments game as diligently as this administration. The legal basis of the things we believe in are still pretty much intact, but the appointments ... change the way these laws are administered... Extraordinary emphasis was placed on ideological sympathy with Ronald Reagan as a criterion for hiring." Commenting on Mackenzie's observations, *Newsweek* adds, "But nowhere was the Reagan litmus test exercised as conscientiously as in the judiciary. The president has already appointed fully half of the nation's 744 federal judges and Mackenzie predicts that it is in the courts that the Reagan imprint will linger the longest."[2]

Presidents can, of course, listen to public opinion in appointing judges, but their chief advisors come not from the broad public but from a small political elite who have a personal interest in the policies pursued by the judicial branch. Belonging to this elite are mainly officials within the Department of Justice, Senators, the judges themselves, and the American Bar Association, an organization of influential

[1] Robert Scigliano, *The Supreme Court and the Presidency*, The Free Press, N. Y., 1971, p. 95.
[2] Victor S. Navasky, *Kennedy Justice*, Atheneum, N. Y., 1971, p. 259.

[1] *Congressional Record*, September 26, 1980, p. S 13636.
[2] *Newsweek*, June 3, 1985, p. 38.

lawyers. The advice of the U.S. Attorney General, who heads the Justice Department, may prove decisive in determining who the President picks to fill a vacancy.

The influential and at times decisive voice of the Attorney General in the selection of candidates to fill federal judgeship vacancies can be detrimental to the independence of the judiciary, since it is also the Department of Justice that is responsible for the prosecution in government cases in the courts. The possibility cannot be excluded that in deciding a case, a judge may be influenced by the knowledge that the case may affect the interests of the government institution that later might determine his career. It has been revealed during Congressional hearings that some federal judges, before sentencing, call the Department of Justice to seek advice on the sentence.

In making appointments to district and appellate court vacancies the Senate is an active rival of the Attorney General. Many nominees are suggested directly by their Senate sponsors, without whose support their appointment may fall through. The senatorial patronage system is reinforced by the institutionalized practice of "blue slips." When the President makes public his choice for a federal judgeship, the Senate Judiciary Committee sends to the Senators from the state where the judge is to serve a request of opinion on light-blue paper, on which the Senators are to give their opinion of the nominee. In effect, the "blue slip" is a way of asking the Senators' approval of the nominee. If the Senator approves the nominee, the form is returned, and if he opposes, the "blue slip" is jettisoned, depriving the candidate of any further chances.

The system of senatorial patronage poses no major obstacles to the White House in carrying out its judicial appointments strategy. Rather, the candidate who emerges victorious from the presidential elections always has political debts to pay off, which he does by appointing people loyal to Senators who supported him to key positions within his Administration. Also, by doing a Senator a favor, the President can expect reciprocal support for Administration programs in Congress. The appointment of judges thus involves political brokering and is part of flexible interaction between the White House and Capitol Hill.

How much real influence do presidential appointments exert over judicial decision-making? After all, the judges' irremovability and their lifetime tenure do shield them from policy fluctuations from Administration to Administration, and their ideological sympathy with the President who appointed them does not rule out independent decision-making in the context of the overall political situation and changing concepts and approaches. U.S. history has known such "deviations." A well-known example is the appointment, in 1953, of former California Governor Earl Warren as Chief Justice of the Supreme Court, a move that President Eisenhower, who appointed him, later called a "major mistake." Warren, who had acquired a reputation as a moderate conservative before his appointment, eventually tilted the Court to the liberal lines and created a body of law in the spirit of liberal constitutionalism.

The way presidential appointments affect judicial policies can be demonstrated by the example of the Supreme Court. In the 1960s the Warren Court energetically asserted its influence over national life, moving the nation toward greater democracy. Thus, the Supreme Court under Warren strengthened the legal rights of black Americans, struck down some provisions of the anti-Communist McCarran Act, and reinforced the constitutional foundations of justice and the procedural rights of citizens while curtailing the powers of the police and prosecutors. Because of its liberalism, the Warren Court was constantly criticized from the right.

Early in the 1970s the Nixon Administration took advantage of four vacancies on the Supreme Court to appoint men of conservative leanings, including the Chief Justice, Warren Burger, thus wresting control of the Court away from the liberals. The effect of these appointments was soon evident: the Burger Court began to gradually dismantle the landmark decisions established by the Warren Court.

It is worth noting that the Burger Court did not venture overtly to repeal the legal concepts of its predecessor in the area of political rights and freedoms, considering this undesirable in the light of the flexible strategy of the American government under changed conditions.

Over the last 15 years, however, the Supreme Court has tended to chip away at civil rights, gradually narrowing the interpretation of clauses dealing with procedural rights while expanding the ability of the police and the court to use their powers to pursue political ends. The Nixon appointments thus markedly altered the policies at the highest level of the judiciary and will most likely leave a conservative imprint on Supreme Court decisions for a long time to come. The partisan appointments have had long-term political implications for the way the government machinery operates, which, it should be said, fully suits many within the U.S. ruling elite.

In most of the states, judges must undergo election. This involves them in politics and political intrigue. Those who aspire to judgeships have to learn the rules of the game of politics. Similar to local politicians, they run against other

candidates (in most places on a party slate), attend rallies, kiss babies, attend church luncheons, hang up campaign posters and make speeches advertising their virtues. In most states procedures for electing judges to the bench under which candidates are selected from party slates, giving local leaders effective power of nominations, make the links between politics and judges stronger than they are under the federal system.

James Ahern, a veteran police officer who spent many years behind the scenes of law-enforcement agencies, wrote: "Judges are typically faithful party members who have run for other offices and failed, or who have been willing to serve the machine's interests in private law practices or in business capacities. This means that, below the federal level, they are seldom first-rate legal talents; they have had to make their way by means of influence rather than by legal brilliance or even legal competence, and they are compromised before they begin. The judge has considerable power to do favors for people which in turn lubricate the boss's machine."[1]

American studies of judicial practices reveal that when state judges hear cases involving issues on which the two major parties are far apart, the decisions tend to side with the party the judge is affiliated with.[2]

The link between judges and politics is not always easy to uncover, for American ideologists, out to protect the judiciary's image as a non-class institution of social reconciliation, disguise this link, fostering the myth that the American justice system is impartial and objective. "At one time, and in some circles, 'politics' was a dirty word," note Walter F. Murphy and C. Herman Pritchett. "And to suggest that judges and courts were involved in the political arena was heretical."[3] The record of American political life witnesses, however, that political impartiality of judges is nothing more than an abstract conception. It is said in America that judges read both law books and papers. And even while individual judges are able to demonstrate their independence from current party politics, that is, their non-partisanship, the entire judiciary in the United States still remains a part of the political mechanism called on to cater to the interests of the ruling class at every stage of the development of American society.

[1] James Ahern, *Police in Trouble*, Hawthorn Book, Inc., N. Y., 1972, p. 102.

[2] James Eisenstein, *Politics and the Legal Process*, p. 198.

[3] Walter F. Murphy, C. Herman Pritchett, *Courts, Judges, and Politics*, p. 3.

3. THE JUDICIAL BRANCH. LEGAL ATTRIBUTES

In American law concepts have been developed to shield the judiciary from "heretical" suggestions that judges are involved in politics. These concepts are designed to make the judicial decision-making process appear purely legal in form, unstained by politics. As defined by constitutional law and the Supreme Court, judicial power is the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision" and "the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction."[1]

This rather broad definition in constitutional law is augmented by other traits. For instance, the chief attribute of judicial power is considered to be the finality of judgment. By this is meant that the ruling passed by the court is binding on all those whom it affects and cannot be revised by any other government agency. Its validity cannot be questioned.

Courts' powers to punish for "contempt of court" and to issue prerogative writs are also recognized as indispensable attributes of judicial power.

Under the Judiciary Act of 1789, federal courts were vested with the power to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before the same."[2] Current law also provides judges with similar discretionary powers to punish summarily individuals or officials for contempt of court. Contempt charges are applicable in cases of obstruction of justice or disobedience of lawful writs, processes, or orders of the court.

Throughout the history of the United States the judges have abused their summary power to bring people to punishment for contempt of court. In the trials of alleged Communists during the McCarthy era and the participants in the Vietnam War protest movement and the radical left in the 1960s, the judges repeatedly resorted to contempt citations to punish those who expressed unorthodox political views in the courtroom or condemned the arbitrariness of judges.

Among the prerogatives of American courts rooted in the British "courts of equity" are the writs of habeas corpus, of injunction and of mandamus. The power of federal courts to issue such writs was granted by the Judiciary Act of 1789 and later demarcated by acts of Congress and Supreme Court rulings.

The writ of habeas corpus, one of the key elements of the

[1] *The Constitution of the United States of America. Analysis and Interpretation*, p. 596.

[2] The Judiciary Act of 1789, 1 Stat. 83 (1789), 17.

American legal system, has its roots in Anglo-Saxon law. The term derives from the Latin, literally, "you have the body." Habeas corpus is thus a judicial writ addressed to the official responsible for the detention of an arrested person demanding that the person be brought before a judge and that the judge be informed of the grounds and time of detention. In this case the judge is required to inquire into the lawfulness of the detention. If he finds that there were insufficient grounds for the arrest or that it was made illegally, he is obliged to promptly free the detained individual.

The writ of habeas corpus is a central part of criminal law in the United States. Adherents of Anglo-Saxon jurisprudence regard it as the cornerstone of bourgeois constitutionalism and an important guarantee of the inviolability of the person, respectfully referring to it as the "Great Writ."

Section 9 of Article I of the Constitution, which prohibits the suspension of the writ of habeas corpus except for emergency situations, is based on the assumption that every citizen has the inalienable right to petition a court to issue a habeas corpus and verify the legality of his detention. For this reason the writ of habeas corpus is regarded in the United States as an indispensable attribute of judicial power.

The Judiciary Act of 1789 empowered federal courts to issue writs of habeas corpus in all cases involving federal jurisdiction. This jurisdiction was extended by the Act of Feb. 5, 1867 to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[1] This meant that the habeas corpus privilege was extended to persons arrested under the laws of the states. In practice, however, a judge's invalidation of an arrest under a habeas corpus writ does not always lead to the release of the detainee in a state, as in most cases the "grant of the writ is expressly made conditional in order that the state may retry the prisoner in a fashion meeting constitutional demands."[2]

The right to petition a federal judge for the issuance of a writ of habeas corpus offers many people illegally charged by a state court a procedural opportunity to seek justice. Notwithstanding the small proportion of habeas corpus petitions actually acted upon by federal courts, and the even smaller number of people freed as a result, the power of federal judges to issue habeas corpus writs in cases involving state law has always been heavily attacked by conservatives. Even in the last century there were protests against "the prostitution of the writ of habeas corpus, under which the decisions of the

[1] Charles Alan Wright, *Handbook of the Law of Federal Courts*, West Publishing Co., St. Paul, Minn., 1976, p. 237.
[2] Ibid, p. 238.

State courts are subjected to the superintendence of federal judges."[1] Today, too, this right, one of the oldest formal guarantees of legality, is under attack. The Burger Court, siding with those who advocate scrapping or substantially restricting many of the democratic principles of justice, has ruled in favor of restricting the cases when a person prosecuted under state law can petition federal courts for a habeas corpus. It has been pointed out in *Saturday Review* that "the Burger Court, by refusing to hear constitutional claims that were raised in the state courts, as well as those that were not, has undermined the writ of habeas corpus and thereby the Constitution itself."[2]

A writ of mandamus is a binding order issued by a federal court to a lower court, a state court, a federal officer or agency commanding the performance of a particular duty with regard to the party requesting the writ. The practice of the courts is to exercise with caution their right to issue writs of mandamus, for they are considered "extraordinary remedies ... reserved for really extraordinary cases."[3]

An injunction is a writ by a federal court to a lower court or a state court, federal officer or agency, or state officer, requiring the person or persons to whom it is directed to refrain from performing a particular act pending a decision on its legality. In constitutional law an injunction theoretically is considered an inviolable component of judicial power and in principle cannot be limited by statutes. At the request of a plaintiff who feels that his rights have been violated, a court has the right to issue an injunction in any sphere of activity under its jurisdiction. Yet, throughout American history, Congress has imposed various limitations on the right of courts to issue injunctions. Almost all of these limitations have been ruled constitutional by the Supreme Court. And yet, the power of the courts to issue injunctions remains intact in politically and socially vital cases in which the constitutionality of laws is challenged, the interests of workers and employers clash, voter eligibility is questioned or when citizens attempt to assert their political, civil or procedural rights in suits against the government.

Injunctions have been used by the courts to suppress industrial strikes by workers. The federal government began to employ injunctions against strikes back in the late 19th century, getting the courts to declare a particular strike an "illegal conspiracy" aimed at undermining "inter-state commerce" or "obstructing" the performance of a particular government function. The workers' refusal to comply with a

[1] Charles Alan Wright, *Handbook of the Law of Federal Courts*, p. 246.
[2] *Saturday Review*, May 28, 1977, p. 11.
[3] Ex parte Fahey, 332 U.S. 258, 260 (1947).

court injunction declaring a strike "illegal" gives the Attorney General the right to send in federal marshals to enforce the court order. Resistance to the marshals is cause for bringing in regular Army units. Also, strike organizers, should they refuse to obey the court injunction, can be brought to court on contempt charges. The history of the labor movement in the United States offers many examples of strikes that were suppressed by court injunctions and armed force.

A less important but no less typical attribute of judicial power in the United States is the power of federal courts to issue so-called declaratory judgments, adopt rules of procedure for the federal courts and admit or disbar attorneys.

A declaratory judgment is the official opinion of a court on a particular issue disputed by two sides. In distinction from ordinary court judgements, which establish the rights and duties of the litigants and impose a settlement—if need be, by force—on them, declaratory judgements merely inform the litigants of their rights and duties relative to a particular disputed issue which normally could be brought before a court for a binding judgement. They save the already overloaded courts time and resources since they do not require the holding of extensive hearings on all matters relative to the case. Also, the litigants, learning beforehand the court's position, often prefer to follow the court's advice rather than pursue an expensive and time-consuming litigation.

One aspect specific to the United States judiciary is the power of the courts to set legal standards in areas which in other countries are considered the domain of legislative bodies. For instance, based on law-making powers expressly delegated to it by Congress (such delegation is very questionable from the standpoint of constitutional theory), the Supreme Court adopts rules of procedure for the federal courts which have the force of law.

Several principles have been developed in U.S. constitutional law designed to impose limits on judicial power. Under Article III, the jurisdiction of federal courts extends only to "cases" and "controversies" (the latter relates to civil cases). To be called a "case" as implied by the Constitution, thus making it subject to court jurisdiction, a legal dispute must meet several formal requirements. These requirements, drawn up by the courts themselves, have been altered and redefined in relation to different areas of law. The upshot is to collect often casuistic and evolving standards regulating access to courts. Access depends, among other things, on the legal status of the plaintiff, whether his suit is filed properly, a personal interest in resolving the dispute, and the jurisdiction of the court in which the suit is filed.

The regulations established by the Supreme Court are so unstable that even many American constitutional law experts

are hard pressed to give an exhaustive enumeration of all the conditions that must be met to bring a case to court. More, the Supreme Court itself, in its appellate jurisdiction, has a wide latitude in deciding whether to hear the case at all.

There are three ways for a case to go before the Supreme Court as the highest federal appellate court: on appeal, by certiorari and by certification.

On appeal refers to appeals of those rulings by lower federal courts or state supreme courts in which the constitutionality of a federal law or a law of a state was challenged. According to the Rules of the Supreme Court of the United States, the case must contain a "substantial federal question." In theory, all cases filed on appeal must be accepted by the Court automatically.

The Supreme Court accepts cases by certiorari from inferior courts when a petition is filed by a litigant alleging that his constitutional rights were substantially violated as the result of the application of a certain law in the case he appeals. The Court reviews writs of certiorari at its own discretion, and only when there are "special and important reasons" for doing so.

By means of certification an inferior appellate court tries to secure the Supreme Court's judgement on a particular legal aspect of the case considered on appeal.

Notwithstanding the various legal procedures by which cases are brought before the Supreme Court, its jurisdiction over appeals is quite discretionary, that is, it is up to the Court to decide which cases to hear and which to reject. The main challenge confronted by a person wanting to bring his case before the Supreme Court is thus trying to persuade the Court that his case involves a "substantial federal question," rather than to show that the lower court erred.

Access to a court in the federal system is thus conditional on so many factors that a plaintiff would have a hard time sorting out all the rules and regulations without the services of a skilled and expensive lawyer.

The issue of access to a federal court has important political implications as well. Under the American legal system, in which there are no ombudsmen to hear and investigate complaints by private citizens against government officials or agencies or effective administrative procedures for challenging unlawful acts by officials, resort to the courts is for many citizens the only reliable remedy to protect their rights and assert their legitimate interests. Restricting access to courts for defending civil rights or making this access more complicated objectively serves the interests of those who seek to strip the democratic rights and guarantees of their force and place them at the full discretion of administrative agencies. Under the Warren Court (from 1953 to 1969), access of

citizens to the federal courts was somewhat expanded. In the 1970s, after the Court had become dominated by conservatives, access to federal courts was again curtailed. "Under the Burger Court, access to the federal courthouse door is very gradually but steadily being restricted for activists seeking social change. Citing the increasing workload as a partial reason, the Burger Court has employed a variety of devices to cut back: raising procedural difficulties for plaintiffs, eliminating some fees awarded to lawyers, and demanding that civil rights advocates prove a discriminatory intent in cases of racial segregation. The Supreme Court has also insisted that more constitutional claims be heard by state rather than federal courts." (*Time*, April 4, 1977, p. 38.) "There can be no doubt that the Supreme Court is now resolved to hear fewer cases and give less protection to constitutional rights... Nearly everything the Burger Court does seems designed to keep people out of court." (*Saturday Review*, May 28, 1977, p. 12.)

Over the years the Supreme Court has established several minimum conditions that must be met for a case to be brought before a federal court. First, the case must involve an actual controversy between "adverse litigants." Second, the controversy must involve substantial legitimate interests of one of the parties to the suit, which, if violated, would or could cause veritable damage to those interests. Third, the right or interest which the plaintiff calls on the court to protect must be personal; suits to protect the interests of another person are in principle not allowed. Fourth, the controversy must involve a real interest, as contrasted with abstract, hypothetical, or moot issues brought before the court merely to seek the court's judgement on the matter.

The latter requirement implies inadmissibility of any requests for the issuance of an advisory opinion on various legal issues, no matter from whom the request may originate (which does not contradict the Court's power to issue declaratory judgements since these are related to cases justiciable by all indicators). The precedent for rejecting such requests was established in 1793, when the Supreme Court categorically denied a request by President Washington and Secretary of State Jefferson for the Court's opinion on a number of legal issues pertaining to European wars of that period. In the reply of Chief Justice John Jay to the request, the precedent was established that the Supreme Court did not decide legal issues outside specific "cases" and "controversies." As a result, the jurisdiction of U.S. federal courts was limited to "purely justiciable" cases.

Another restriction on the judiciary is that courts, by dint of the official doctrine of "political questions," are not supposed to accept cases arising out of issues which, under

constitutional dogmata, lie within the province of "political branches"—the legislative and executive branches.

The criteria of what exactly constitutes a "political question" and thus one that is not justiciable change with time and place. Commenting on the instability of the judicial criteria of "political questions," Jack W. Peltason, a noted American legal scholar, views such questions as "those which judges choose not to decide, and a question becomes political by the judges' refusal to decide it."[1]

The precedent for refusing to decide "political questions" was established in a number of early rulings by the Supreme Court. In 1796, for instance, the Court refused to hear a case involving the issue of whether or not a foreign treaty had been broken. In the *Marbury v. Madison* decision, Chief Justice John Marshall ruled that "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[2]

The Supreme Court's treatment of "political questions" took on definite shape for the first time in *Luther v. Borden*. In this 1849 case, the Court refused to issue a decision on which of two rival political factions in Rhode Island could rightfully call itself the government of that state. It ruled that the dispute was "political" and could be decided only by the "political branches" of the government, or in this particular case, by Congress and the President by virtue of Article IV of the Constitution under which the states are guaranteed a republican form of government.

Throughout American history the Supreme Court has avoided becoming entangled in caustic issues of government life by invoking the argument that it lacks jurisdiction over "political questions." More often than not the Court's avoidance of such issues was based on purely practical reasons and reflected an unwillingness to lock horns with Congress or the White House. This is manifest in the general reluctance of the Supreme Court to meddle in the conduct of foreign policy by Congress and the President, even though many foreign policy actions are questionable as to their constitutionality. During the U.S. involvement in Indochina, various petitions were filed with the Court challenging the constitutionality of the President committing troops to action without Congressional approval, but in each instance the Court refused to hear the case, invoking the prerogative of the "political branches." The Court has also steered clear of disputes over the legislative process and adoption of amendments to the Constitution, and until the 1960s, avoided entangling itself in disputes

[1] Cited in Henry J. Abraham, *The Judicial Process*, Oxford University Press, N. Y., 1968, p. 365.

[2] 1 Cr. 137, 170 (1803).

arising out of apportionment and districting. Still another area in which the Court has been hesitant to interfere is the regulation of certain aspects of political party activities. Yet, as the record clearly shows, despite a self-imposed restraint, the Court has frequently ruled on so-called political questions, and has done so quite confidently.

During the Kennedy Administration, the Supreme Court passed the well-known ruling in the *Baker v. Carr* case, which demonstrated its ability to get involved in issues traditionally resolved by the "political branches." The matter of the case was as follows. The plaintiffs claimed that the drawing of districts for elections to the General Assembly in Tennessee counties deprived citizens of equal vote. The districts had been drawn in 1901, and the population subsequently grew and migrated, especially in the cities. As a result, representation in the state's Assembly was disproportionate to the population sizes, with the rural vote "outweighing" the urban. Over the years, the legislators had rejected any reapportionment. The plaintiffs maintained they were denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution.

Fifteen years earlier, the Supreme Court had refused to hear a case challenging the constitutionality of the drawing of districts in the state of Illinois, ruling that the suit presented a "political question" and was therefore nonjusticiable. But in *Baker v. Carr*, the Court narrowed its criteria of what constituted a "political question," declaring the outdated formula for election districts unconstitutional and establishing a one-man, one-vote rule to be followed by the states.

The inconsistency of the Supreme Court in applying the criteria of what constitutes a "political question" is mainly due to the very relative nature of the separation of politics and the courts, and in specific instances—to political and legal factors affecting the decision of the court to accept or reject a case for hearing. Among such factors are public opinion, indirect pressure from the government through institutional channels (such as participation of a government representative in hearings), the foreign policy implications of a case, or the articulateness and persuasiveness of a plaintiff.

4. CONSTITUTIONAL REVIEW, POLITICAL WEAPON OF THE COURTS

The U.S. judiciary, endowed with a wide range of legal accessories and attributes, helps shape government policies and

exercises considerable influence over the political process in the United States.

The political nature of the American justice system is conditioned by the mere fact that courts are part of the capitalist government machinery. Vested with powers of legal coercion, American courts, whose judicial policies ape the general political course of the ruling class, are, in the words of Lenin, a "subtle instrument" for protecting the interests of the moneybags.[1] Also, in resolving specific controversies, American courts often overstep traditional boundaries of judicial province. U.S. history can provide numerous examples when it was the judiciary, particularly the Supreme Court, that played the key role in the resolution of a divisive dispute known for its political, not legal, implications, and greatly affected the course of political events. Notwithstanding its formal avoidance of "political questions," over the last thirty to forty years the Supreme Court has either decided or been instrumental in shaping the outcome of such key political and social issues as the racial integration of schools, equal voting rights for blacks and whites, election laws, the constitutionality of the death penalty, the publication of classified government documents, equal access to higher education, freedom of speech and the press, the legitimacy of presidential actions and Congressional control of federal agencies. Courts in the United States may also rule on specific controversies arising out of the conduct of foreign policy. For instance, in October 1980, during the Iranian hostage crisis, a federal court in New York ruled that the Administration had acted legally in freezing $8 billion in Iranian assets deposited in U.S. banks.

The constitutional crisis brought on by the Watergate affair demonstrated quite clearly the political influence exercised by the judiciary: in considering the legal case of whether the Nixon White House tapes were admissible as evidence, the Court issued a decision whose ultimate political effect was President Nixon's resignation. The Court ordered Nixon to turn over to prosecutors tapes of his conversations with Administration officials relevant to the Watergate affair. The tapes linked Nixon and his aides to participants in the burglary of the offices of the Democratic Party headquarters in the Watergate hotel, and that's why the President's resignation became inevitable. Official propaganda presents the Watergate affair as a triumph of American constitutionalism and proof of the independence of the judicial branch, which enabled it to decide the fate of even the President himself. However, we should not overestimate the significance of this particular decision by the Supreme Court, or, for that matter, the political role of the judiciary on the whole. For what was

[1] V.I. Lenin, *Collected Works*, Vol. 26, 1972, p. 464.

being decided here was basically a narrow question of law: whether a person has the right to refuse to comply with a subpoena for evidence in a criminal case, even if this person is the Chief Executive. In giving a negative reply, the Supreme Court cited basic rules of procedure that bind trial courts to examine all evidence relevant to the case—both incriminating and exculpatory; besides, the argument of Nixon's attorney that executive privilege could be invoked to absolve a President of the obligation to turn over confidential materials was weak legally and did not contain convincing references to national security interests.

By regulating specific actions by a President or nullifying a particular piece of federal legislation or state law, the Supreme Court has on the whole fostered an increase in the powers of the federal government, expanding the regulatory powers of Congress and strengthening the executive. In doing so, it has helped to shape government strategy and defined the parameters of American constitutionalism.

Once, when the Supreme Court was faced with a possible nullification of a state statute, Chief Justice Warren Burger is reported to have told his fellow justice: "We are the Supreme Court and we can do what we want."[1] Although Burger's bold assertion should not be taken at face value, it holds much truth. The United States Supreme Court is vested with vast power and issues decisions that go far beyond the specific matter in the courtroom and may affect the lives of millions of Americans for years to come. In the words of Bob Woodward and Scott Armstrong, Supreme Court decisions "ultimately affect the rights and freedom of every citizen—poor, rich, blacks, Indians, pregnant women, those accused of crime, those on death row, newspaper publishers, pornographers, environmentalists, businessmen, baseball players, prisoners and Presidents."[2]

Where do the real power and political influence of the Supreme Court originate? From a literal reading of Article III of the Constitution it can be concluded that the Supreme Court is, basically, the highest federal appellate tribunal.

The Court's original jurisdiction extends to a small category of cases involving ambassadors and other official representatives of foreign nations, and also cases to which a state is party. In all other cases, it functions, again, as the highest federal appellate tribunal.

But the real power of the Supreme Court derives not so much from the performance of its duties as a final appellate

[1] Bob Woodward and Scott Armstrong, *The Brethren*, p. 61.
[2] Ibid, p. 1.

court as from the performance of the function of constitutional review, or judicial review of the constitutionality of legislative and administrative enactments. In practice this means that a statute enacted by the U.S. Congress or a state legislature or an act issued by an executive agency at the federal or state level may be declared unconstitutional by the Supreme Court and thus stripped of its legal force. However, the Supreme Court can exercise judicial review only over a specific case duly brought before it for consideration, and not in general: it rules on fate of a case on the basis of law, and it rules on fate of a law on the basis of a case.

Oddly enough, the Constitution provided no mechanism or guidelines for the exercising by the Supreme Court of judicial review over the actions of the executive and legislative branches. What's more, in the course of the debate on the draft Constitution in 1787, some of the Framers were wary, sometimes even overtly hostile, to the idea of granting the courts review powers, fearing that the balance of power between the three branches of government would gradually tilt in favor of the judiciary. Richard Dobbs Spaight, one of the Founding Fathers, denounced judicial review as "usurpation,"[1] and James Madison, the celebrated ideologist of the American Revolution, doubted about "going too far" in defining the powers of the Supreme Court and suggested to limit its jurisdiction "to cases of a Judiciary Nature." "The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."[2]

Perhaps the sole major political figure of the time to be in favor of judicial review was Alexander Hamilton, who wrote in *The Federalist*: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If therefore should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute."[3]

The record of the debate on the Constitution witnesses, however, that Hamilton, who was a Federalist, intended his case in favor of judicial review as a tactical move to try to alleviate the fear harbored by the antifederalists asserting that judicial review of legislative acts would prevent Con-

[1] *Judicial Review and the Supreme Court. Selected Essays*, ed. Leonard W. Levy, Harper & Row Publishers, Inc., N. Y., 1967, p. 2.
[2] *The Records of the Federal Convention of 1787*, ed. Max Farrand, Vol. II, Yale University Press, New Haven, Conn., 1927, p. 430.
[3] *The Federalist*, pp. 485-86.

gress from gradually usurping the powers and prerogatives of the states. For all this, Hamilton regarded the judiciary as "the least dangerous branch" of the government and failed to mention judicial review even once in his various outlines of the American government.[1]

The power of the judiciary to authoritatively interpret the Constitution was first proclaimed and thoroughly grounded by the Supreme Court itself in the 1803 decision of *Marbury v. Madison*, written by Chief Justice John Marshall. The argument in favor of the institutionalization of judicial review sounded quite convincing.

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules govern the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[2]

The precedent set by Chief Justice Marshall served as the legal basis for the establishment of judicial review in American constitutional practice and its subsequent use by the courts in a broad range of areas.

Many American legal scholars and historians question the legitimacy of judicial review to challenge the constitutionality of executive and legislative acts and maintain that the device owes its existence merely to the bold (though not always streamlined) logic of Marshall's argument.

Yet the establishment of judicial review in the constitutional system is less a result of the inspiration and initiative of Marshall than of objective political, economic, historic and legal factors. Its emergence was predetermined by the very logic of the formation and consolidation of the newborn independent American state. Commenting on the extra-constitutional birth of judicial constitutional review, American scholar Leonard W. Levy noted, "The legitimacy of judicial review does rest on history, but not on the words of the Constitution nor of the framers during the 1787-89 period. It was an historical

[1] *The Papers of Alexander Hamilton*, Vol. IV (Jan. 1787-May 1788), ed. Harold C. Syrett, Columbia University Press, N. Y., 1962, pp. 178-211.
[2] W.F. Murphy, C.H. Pritchett, *Courts, Judges, and Politics*, p. 38.

outgrowth of the constitutional theory of the era of the American Revolution."[1]

The Founding Fathers aimed to create a government that would be more perfect than the monarchies of the Old World and were guided by the ideas of establishing an independent state that would best guard citizens from any possible abuses and encroachments on the part of the government. The idea of ensuring a moderate government whose ability to impinge upon the natural rights and liberties of the individual would be held in tight check, was borrowed from political doctrines of the 17th and 18th centuries, particularly Locke and Montesquieu, and reflected the political interests of the bourgeoisie locked in a battle with feudalism and absolutism. On American soil, the confrontation between the bourgeoisie and the feudal estates manifested itself in resistance to the authority of the British Crown. In the constitutional doctrines expounded in the period of the American Revolution, hostility to British authority took the form of distrust of all authority and of a strong, centralized government in particular, thus giving birth to a form of government based on the principle of separation of powers, designed to share the powers among formally independent branches of government.

The mechanism of separation of powers employs two types of checks— functional and organizational. Whereas organizationally a certain rigidness can be observed in the separation of the three branches of government (for example, courts have no organizational link to executive and legislative branch institutions, nor are they responsible to them), with regard to functional division the case is much different, with considerable overlap of the functions of the three branches. The absence of rigid functional boundaries is not, as it might at first seem, contrary to the principle of separation of powers. Rather, this principle, reflecting the bourgeoisie's interest in creating a flexible mechanism of power, assumed that the three branches would interact in such a way as to preclude the possibility of one branch gaining power at the expense of another. Hence the theory that the three branches would balance and check one another, thus ensuring a steady and balanced forward movement. Not only did the Founding Fathers have to safeguard against possible abuse of power by vesting each of the branches with the minimal range of powers necessary for them to keep each other in check, they also had to ensure that the divided government mechanism would operate smoothly, effectively and as a single whole. In the final analysis it is in this that rests the objectively predetermined class interest of the American industrial-financial oligarchy.

[1] *Judicial Review and the Supreme Court. Selected Essays*, p. 7.

Judicial review was meant to become and did become a key component of the system of checks and balances. It was also necessitated by the desire of the bourgeoisie to consolidate and further promote capitalist relations based on property rights. American scholar Charles A. Beard noted in this regard that the delegates to the Constitutional Convention, gathered to write a Constitution for the new republic, "knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain."[1] The Framers of the Constitution, in Beard's opinion, anticipated the possibility of judicial review as a component of the system of checks and balances which was designed to safeguard "the interests of property against attacks by majorities." "This very system of checks and balances," he pointed out, "which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property."[2]

Conservative elements among the bourgeois politicians saw in judicial review exercised by an elite corps of judges a rather effective weapon for neutralizing the democratic impulses of the legislative branch of government and a legal means to guard against the tyranny of representative institutions.

The idea of judicial review was in principle supported by the two major political parties of the time, the Federalists and the Republicans, for both rival parties saw judicial review as providing opportunities to invalidate laws which they opposed. It is for this reason that both parties agreed that under the constitutional system the power to issue a final decision on the constitutionality of an act by Congress should rest with the judicial branch.

The idea of judicial review thus became crystallized amid party rivalries and confrontations, with each faction pinning on the courts hopes of realizing its current goals.

The roots of the idea of judicial review can also be found in law. The Constitution itself states that judicial power extends to all cases arising out of the Constitution (Section 2 of Article III), that the Constitution is the "supreme law of the land," that federal laws are made in pursuance of the Constitution, and that judges are bound by oath or affirmation to support the Constitution (Article VI). Section 25 of the Judiciary Act of 1789 expressly granted the Supreme Court the right to review decisions by state courts in the course of constitutional review.

[1] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, The MacMillan Co., N. Y., 1935, p. 151.

[2] *Judicial Review and the Supreme Court*, p. 3.

The precedents providing for the right of the judiciary to review acts by legislative bodies and to proclaim them invalid by virtue of their being contrary to "supreme laws" were also set by the courts themselves. Five years before the *Marbury v. Madison* ruling, the U.S. Supreme Court invalidated a state law that contradicted the provisions of a foreign treaty. In the period between the Declaration of Independence and the adoption of the Constitution, the courts struck down laws passed by state legislatures, but each case sparked a dramatic conflict between the courts and the legislatures.[1]

The institution of judicial review was not only a logical outgrowth of the constitutional mechanism of power relationships and of emerging legal traditions, but also a practical offspring of the two major trends which led to the American Revolution: the movement to liberate the colonies from the oppressive British yoke, and the movement to democratize American political, economic and public institutions. Judicial review, which held out a potential guarantee against the abuses of administrative agencies and the enactment and enforcement of laws impinging upon the constitutional rights and liberties of citizens, found support among democratic elements in the new republic who in creating an independent state sought to establish a bourgeois-democratic legal order that would preclude the kind of authoritarian rule common to the European monarchies. "It was the resistance to English authority which culminated in the American Revolution," noted Charles Haines, an American law scholar, "that rendered the conception of a fundamental law and of individual natural rights popular and encouraged judges to regard it as their peculiar duty to guard and defend the superior laws."[2]

It was the political and philosophical doctrines of the American Revolution, practical political considerations, legal traditions, the principle of the supremacy of law, and the economic interests of the bourgeoisie together that spawned the idea of judicial constitutional review, which has become an inherent element, a distinguishing trait of American constitutionalism. The rooting of judicial review into the political fabric of the United States was not a painless process. Various political factions within the ruling class, as well as their representatives in executive and legislative branches at the federal and state level, have resisted and continue to resist energetically the expansion of power of the federal courts. Regardless, judicial review has set down deep roots in the American political system and has become a part of the "living" Constitution.

Having secured a "peculiar duty" to interpret the Consti-

[1] *Judicial Review and the Supreme Court*, pp. 9-10.

[2] Charles Haines, *The American Doctrine of Judicial Supremacy*, Da Capo Press, N. Y., 1973, p. 59.

tution and thus invalidate acts or actions of the legislative and executive branches, the Supreme Court created the foundation upon which its powers and influence rest today. Supreme Court decisions establish legal precedents which are binding on all courts, law-enforcement agencies and other governmental institutions.

Since its creation and by 1980, the Supreme Court had invalidated, wholly or partially, over 100 statutes enacted by Congress, 900 provisions of state statutes or constitutions, and 100 municipal ordinances. In the *Chadha* case alone in 1983, the Court annulled provisions of 200 statutes. In the words of President Woodrow Wilson, "The Supreme Court is a constitutional convention in continuous session."[1]

Nonetheless, judicial review continues to be the focus of sharp debate in academia and among politicians. Critics of judicial review contend that court regulation of actions by the legislative and executive branches is utterly undemocratic, for judges, who have lifetime tenure, answer to no one, and make decisions behind a veil of secrecy enjoying broad discretionary powers, have the power to invalidate laws enacted by "people's representatives" in the legislatures and dismantle the programs of a President "chosen by the people." Why, they ask, are elitist, politically unanswerable institutions allowed to control popular institutions which express the "will of the majority" and are politically answerable to voters? Why is it a judge, for whom law is but a yardstick by which to decide controversies and disputes, and not a legislator, who is empowered to interpret and overturn laws? Finally, why are the courts allowed to forcefully interfere in politics and social issues, areas in which people entrusted by voters and having political experience and special training should have the final say?

The remarks of William French Smith, an Attorney General in the Reagan Administration, before the National Association of Attorneys General, offer a typical example of the rhetoric around this issue.

"Sometimes the courts have engrafted upon the Constitution interpretations at best tenuously related to its text. Thereby, they have substituted judicial policy determinations for legislative policy determinations. They have removed policy-making from the will of the majority expressed through popularly and regularly elected legislative bodies. In a democracy, that insulation of policy decisions from popular opinion is exceedingly troubling...

"Unrestrained intrusion by the courts upon the domain of the states and the elected branches, however, would foster

[1] Cited in J.W. Peltason, *Corwin and Peltason's Understanding the Constitution*, p. 101.

their politicization. We will urge that the arena of political policy-making should be left to the branches directly responsible to the electorate." (Press Release. Department of Justice. Dec. 2., 1981, pp. 13-15.)

The argument expounded by the opponents of concentration of broad powers of judicial review in the courts seems at first glance quite convincing and reasonable, particularly because of its concern about the usurpation of legislative branch prerogatives. Calls by the executive branch to limit the application of judicial review have in recent years been picked up by Congress, from where various proposals have emerged for legislation to deprive the federal courts of jurisdiction over certain areas. Legislators, angered by the intrusion of the courts in areas in which they, as the "democratically elected" advocates of the "will of the majority," have traditionally enjoyed the final say, have begun to take action. As witnessed by *The New York Times*, "In one bill after another, Congressmen want to tell Federal courts to stay out of important, controversial cases... All these are offered as perfectly proper court-regulating measures. All are of dubious constitutionality. All are dangerous." (Feb. 8, 1982, p. A18.)

For the sake of clarity, let us note that in the United States today, the most vocal opponents of the power of judicial review are least concerned about the fate of democratic institutions. Rather, they are interested in narrowing the scope of judicial review with the prospect of expansion of their own political influence (to be exercised through the legislative and executive bodies) to the detriment of constitutional principles and at the expense of the American people. The frontal assault on judicial review is being led by conservatives and reactionaries of every stripe. Observes *Guild Notes*, a bimonthly publication of progressive American lawyers: "This well planned move on many fronts to limit and severely restrict the power of the federal judiciary is of course not primarily an 'academic' attack on 'judicial activism,' or the 'independence' of the courts. This conscious assault on the federal courts for their decisions in the field of fundamental rights is a critical part of a full scale plan to undermine and destroy all of the most elementary gains and advances of the people in every arena, legal, political, social and economic, won in the intense battles of the past thirty years." These are "the most serious attacks upon the elementary institutions involved in the defense of the fundamental American concept of a written Constitution."[1]

It is difficult to give a generalized and unequivocal assessment of the American institution of judicial review. In inter-

[1] *Guild Notes*, Vol. XI/No. 4, September-October 1982, pp. 10, 11.

preting the Constitution, the Supreme Court lends its rather broad and ambiguous formulations concrete meaning, which, however, changes constantly depending on socio-economic factors, the balance of political forces, the strategies of the government and the international situation. It is for this reason that throughout American history the policies of the Supreme Court have taken on different shades.

Following the Civil War of 1861-1865 the Supreme Court handed down several decisions that rendered ineffective legislative attempts by Congress to guarantee the rights of blacks freed from slavery. In 1883, the Court declared unconstitutional the Civil Rights Act of 1875, which prohibited discrimination "on account of race and color" in inns, public conveyances on land or water, theaters, and other places of public amusement. The Supreme Court ruled that the Act of 1875 did not meet the requirements of the Fourteenth Amendment to the Constitution, since the Amendment guaranteed "equal protection of the laws" by state bodies, but did not bar discrimination on the part of individuals.[1] However the Court, having refused to fully extend to blacks the guarantees of the Fourteenth Amendment (which was adopted purposely to establish their legal equality with whites after the abolition of slavery), soon began to interpret it as if it were intended to protect private property rights, that is, the interests of property owners and entrepreneurs.

In 1886, in *Santa Clara County v. Southern Pacific Railroad*, the Court ruled that the corporations were "persons" who could not be deprived of "liberty and property" without "due process of law" and who were entitled to "equal protection of the laws."[2] "The innovative skills of lawyers and judges," writes Jerold S. Auerbach, has reworked the Fourteenth Amendment "into a shield for corporate power" in a society "whose brief concern for freed slaves had yielded to a more enduring concern for free enterprise."[3]

The class position of the Supreme Court comes through most clearly in the 1905 case of *Lochner v. New York*.[4] The Court ruled unconstitutional a New York labor law fixing the length of the workday in bakeries on the grounds that the statute interfered with "the right to purchase or to sell labor" which is "part of liberty protected by this amendment" and impinged upon the "right of contract between employer and employees." The latently democratic demand of legality (under the "due process of law" clause) came to be interpreted by the Supreme Court as a constitutional free-

[1] *Civil Rights Cases*, 109 U.S. 3 (1883).
[2] 118 U.S. 394 (1886).
[3] Jerold S. Auerbach, *Unequal Justice. Lawyers and Social Change in Modern America*, Oxford University Press, London, 1976, p. 32.
[4] 198 U.S. 45 (1905).

dom to exploit hired labor. This ruling opened a "Lochner era" in the Supreme Court which lasted until approximately the mid-1930s during which time some 200 statutes designed to regulate economic life were struck down. In the first years of President Roosevelt's New Deal, the Supreme Court effectively blocked the government's liberal reforms of the economy by declaring unconstitutional a number of statutes designed to pull the country out of deep economic depression.

During World War II more than 112,000 people of Japanese ancestry, over two-thirds of them American citizens, were forcibly removed from their homes on the West coast of the United States and transferred to relocation centers further inland. This unparalleled act was directed mainly against American citizens, who were protected by the Bill of Rights (the Fourth Amendment) against unlawful arrest, irrespective of their ethnic origin. The American citizens who were arrested and kept under preventive detention had commited no crime nor had any charges been filed against them. There is no other way to classify such arrests than as a gross violation of the constitutional principle of the inviolability of the individual. Regardless, the Supreme Court twice upheld the constitutionality of the presidential order and of the act of Congress, that provided the basis for the action by military authorities.[1]

During the Cold War period and the McCarthy anti-Communist scare the Supreme Court refused to afford constitutional protection to American Communists, upholding in 1951 the convictions of a group of U.S. Communist Party leaders on charges of violating the provisions of the Smith Act.[2] Comments Leonard W. Levy, "The Court was an unreliable champion of constitutional limitations when it was most needed during the McCarthy years."[3]

History thus bears witness that judicial review has at various periods effectively furthered political aims of anti-democratic circles. The court, however, does not exist in a political vacuum—its policies have always been affected by the balance of political forces both within society and among the political leadership, which is why in the interests of maintaining the prestige of the government and in the interests of the bourgeois class as a whole, judicial review has frequently been used to strengthen the democratic guarantees proclaimed in the American Constitution.

Over time the Supreme Court began to exercise its powers of judicial review to adapt laws to fit the current policies

[1] Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).
[2] Dennis v. United States, 341 U.S. 494 (1951).
[3] *Judicial Review and the Supreme Court*, p. 19.

of the ruling class. In the 1960s, the Supreme Court under the leadership of Chief Justice Earl Warren backed away from a number of legal doctrines which had fallen out of sync with the new socio-economic conditions, the rising political and legal consciousness of Americans and the swelling civil rights movement, and embraced new doctrines to replace them. The Warren Court adopted these new doctrines, which were rooted mainly in liberal interpretations of the Constitution, to bring the political, civil and procedural rights of Americans closer to the democratic ideals of the Constitution. It strengthened the legal protection of minorities, removed some of the restrictions on the U.S. Communist Party, and conditioned courts and law-enforcement agencies to respect the procedural rights of the accused and the constitutional foundations of justice. The policies of the Warren Court fully echoed the standards of liberal constitutionalism. Resorting to the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment as the primary instrument, it established a doctrine of "fundamental rights" implied or explicitly granted in the Constitution, which included certain political, civil and procedural rights. However, as Professor G. Gunther points out, "The list of interests identified as fundamental by the Warren Court was in fact quite modest: voting, criminal appeals, and the right of interstate travel were the prime examples."[1] Declaring its readiness to protect "fundamental rights," the Court nevertheless stopped short of including in the list such important socio-economic rights as the right to a job, social security, medical care and housing and failed to use its constitutional powers to protect the elementary economic rights of the lower classes.

Another noteworthy feature of the liberal policies of the Warren Court is that in its interpretations of the Constitution it had a tendency to avoid politically charged cases in favor of disputes in which the ruling class had a lot less at stake. For instance, Court rulings on the freedom of expression had the effect of extending constitutional protections to the Ku Klux Klan; an impressive body of doctrines and standards affecting the freedom of the press was utilized for scholastic exercises in defining "obsenity" as it applied to pornographic publications; and the politically sensitive issue of privacy was mainly explored in the context of suits related to the constitutionality of abortions and birth control.

Other circumstances may be worth citing. For instance, the Supreme Court, in overturning the convictions of Communist Party leaders found guilty of violating anti-Communist provisions of the Smith Act, stopped short of declaring this patently undemocratic law unconstitutional. It merely laid down new,

[1] *Cases and Materials on Constitutional Law*, p. 659.

relatively rigid standards for the establishment of guilt under the Act's provisions.[1] Proposals have been advanced in recent years to include provisions of the Smith Act revised to fit these standards in the new federal criminal law code. The Court thus left this weapon of political repression dormant.

In a number of cases involving the due process guarantees, the Supreme Court imposed certain requirements on police and prosecutors which have helped to safeguard the procedural rights of defendants. These rulings provoked extreme anger from right-wing circles, who accused the Warren Court of abetting criminals. The blinders of extreme conservatism did not enable these critics of the Warren Court to discern in its decisions the striving to improve the criminal justice machinery and render it more flexible, to polish and refine the tactics of law enforcement.

On the whole, the Warren Court understood and employed judicial review as a means of bolstering constitutionalism and maintaining the prestige of law and justice in the long-term interests of the capitalist state. In the early 1970s, during the Nixon Administration, however, a number of new appointments to the Supreme Court were made with an eye to altering its philosophy and ensuring the return to a strict, conservative interpretation of the Constitution.

The following should be noted in this connection. A close study of the decisions taken in the last 15 years by the Nixon-renovated Supreme Court reveals that the Court has not undertaken a drastic reversal of Warren Court rulings in the area of procedural guarantees of justice. In recent decades, it is this area that has been the focus of fierce confrontation between democratic forces and reaction. The reversal has come gradually, not always noticeably. Writes Professor Archibald Cox of Harvard Law School: "The Burger Court does not respond to humanitarian, libertarian, and egalitarian values with all the enthusiasm of its predecessor. It is more worried by complexities, cross-currents, and needs for accommodation that refuse to yield to optimistic generalizations. A court more concerned with the preservation of old substantive values than the articulation of a new spirit is likely to find fewer occasions for rendering activist decisions even though the Justices are not restrained by a modest conception of the judicial function. There are strong indications, however, that the new Justices will not revert to the philosophy of judicial self-restraint when an existing rule offends their policy preferences."[2]

The Burger Court has begun to gradually dismantle the

[1] Yates v. United States, 354 U.S. 298 (1957).

[2] Archibald Cox, *The Role of the Supreme Court in American Government*, Oxford University Press, N. Y., 1976, pp. 101-02.

liberal doctrines of the Warren Court without yet having decided to abandon them completely, but reducing the scope of judicial review in resolving constitutional arguments. Its rulings on a number of legal issues witness a gradual shift to the right. This shift is met with approval by all conservative groups in the United States and particularly by representatives of those government institutions for which constitutional guarantees of rights of the citizens have always been a burden—the police and prosecutors.

The trends in the use of constitutional judicial review over the course of American legal history make it difficult to give a generalized institutional appraisal of it in terms of its democratic or undemocratic nature. However, our brief survey of the history of judicial review enables us to make the following conclusions.

Judicial review of acts and actions by the legislative and executive branches of government as to their constitutionality, being an outgrowth of the system of checks and balances within the mechanism of separation of powers, has become an American legal institution and in this sense is democratic to the same degree as any bourgeois institution is. Depending on a given political situation, the American judiciary may pursue a liberal or a conservative course. But in any case, the course pursued has one objective—to preserve and consolidate the capitalist system.

American political scientists note that "For most of its early years—indeed for most of its existence—the Supreme Court could be fairly described as predominantly sympathetic to the claims of wealth and privilege."[1] The application of judicial review to consistently affirm the democratic principles proclaimed by the American Constitution, as was the case under the Warren Court, is but one method to bolster authority of the government and maintain its prestige in the eyes of the citizenry. Of late, the Supreme Court has gradually reverted to a course of a limited, conservative interpretation of the Constitution, which is fully comforting to those groups in the ruling elite who set their hopes on harsh methods to preserve legal order. The decisions of the Warren Court have not become rooted in the fabric of everyday life but merely represent a peak which American constitutionalism once reached but was unable to hold.

The limits of judicial review in the United States also have purely legal aspects. The Supreme Court had developed a number of principles restricting the possibilities to invalidate a law. In accordance with the "strict necessity" doctrine,

[1] Peter K. Eisinger, *American Politics*, p. 220.

the court accepts cases related to constitutionality issues only in the event of clear necessity and its decisions on them are as narrow as possible. A law can be held unconstitutional only when a "clear mistake" was made by the legislator; in judging the law, the court must not go into the political motives and practical considerations of the legislator but must proceed from the presumption that the law is constitutional. In resolving constitutional disputes the court must adhere to *stare decisis*, the principle of adherence to precedent. Since these principles are not binding on the courts, in practice they may be implemented in various ways. But so as to avoid direct conflict with the two other branches of government, the courts must state their willingness to adhere to these principles, at least formally.

The class and legal limits of judicial review are only part of the problem. Under certain historical conditions, judicial review quite tangibly displays its democratic potential. Alexander M. Bickel, a noted legal scholar, suggested that to bring judicial review into concord with democratic theory "requires a closer analysis of the actual operation of the process in various circumstances." Noting that "full consistency" of judicial review "with democratic theory has not been established," he added, "It may further be that if the process is properly carried out, an aspect of the current—not only the timeless, mystic—popular will finds expression in constitutional adjudication. The result may be a tolerable accommodation with the theory and practice of democracy."[1]

The realities of the American legal system witness that the appeal in federal courts of unlawful acts by government agencies on the grounds of their unconstitutionality is practically the only way for private citizens to protect their rights and legitimate interests. The legal system in the United States makes no provisions for an independent agency to monitor the legality of activities of government agencies, and administrative procedures for reviewing complaints are inadequate, cumbersome, given very little publicity and are shrouded in secrecy, thus giving the authorities a much greater opportunity than in the courts to wield influence over decisions. Under these circumstances, the right of free access to courts has become rooted in the political and legal fabric of the United States. It is for this reason that progressive forces in the country are adamantly opposed to narrowing the scope of judicial review, seeing in such narrowing an attempt to undermine the democratic ideals of the American people.

It would be naive to contend, as do opponents of judicial

[1] Alexander M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, The Bobbs-Merrill Company, Inc., Indianapolis, 1962, pp. 27-28.

review, that legislative bodies are capable themselves of rectifying their own mistakes and repealing unconstitutional laws of their own design. The overturning of laws limiting constitutional rights and freedoms does not represent encroachment on the sovereignty of the people but rather is a necessary method of protecting the Constitution as the supreme law proclaiming the idea of popular sovereignty. The Supreme Court has best protected the Bill of Rights whenever it confirmed the superiority of its provisions, declaring unconstitutional a law passed by Congress or a state legislature, that is, when from the logical viewpoint it "encroached" most upon the prerogatives of "the representatives of the people."

The Supreme Court was conceived and instituted as the highest appellate court of the Nation and as a trial court with a very specific and limited jurisdiction. But in fact it has evolved into a political institution energetically participating in the political decision-making process.

The special role of the judicial branch and its ability to exercise considerable influence over the functioning of the American political system are clearly evident. This role emerged and became institutionalized on the basis of the Constitution only in a formal sense. In reality, it is a result of processes occurring outside the constitutional framework. No matter how much American critics on the right lament about judicial review being the "paradox" of American democracy (behind these lamentations have always stood everyday political considerations, including those connected with the drawing up and carrying out of undemocratic measures), all political figures in the United States continue to hold an unabiding sense of respect for the judiciary and the Supreme Court. That is why, in the opinion of American experts, "for all the protests, the power of judges is likely to increase, not diminish, in coming years."[1]

Ruling circles in the United States see maintenance of the prestige of the judiciary in general and the Supreme Court in particular as their immediate class interest. The U.S. Supreme Court is a bastion of the American political elite (irrespective of the ideological bent of its decisions) and a very important political institution ensuring the overall stability of the capitalist society and reliably safeguarding the legal foundations of bourgeois constitutionalism by the means that are available and politically suitable.

[1] *U.S. News & World Report*, January 16, 1978, p. 41.

Chapter 4

CONSTITUTIONAL RIGHTS AND FREEDOMS. LEGAL GUARANTEES AND POLITICAL REALITY

The notion that citizens' rights and freedoms should be widely protected is central among the principles and ideals of American constitutionalism. The rights and freedoms proclaimed by the American Constitution have been idealized ever since the American Revolution, and their significance for the individual is often made into a fetish by American ideologists, politicians and legal scholars.

American constitutional doctrine embodies such political rights and freedoms as the freedom of speech, of the press, of assembly, of religion, the right to petition the government, the right to vote and freedom of association. Among procedural rights are the inviolability of person and home, the right to due process of law when accused of a crime, the right to a lawyer, freedom from "cruel and unusual" punishment and some others.

For the individual, all of these rights and freedoms are of tremendous importance, for it is they that determine the individual's legal status in the political community; taken together, they form a sort of a channel through which the relations of the government and the individual are realized and owing to which the individual acts as a citizen.

American constitutionalism in the sphere of citizens' rights rests not on the unity of interests of the individual, society and the state, but on the pitting of the legally autonomous individual against the state, society and other individuals. This basic premise to a certain measure determines the constitutional institutions of any capitalist state, for these institutions were conceived and developed to protect the capitalist mode of production and defend the rights of private property.

In the American constitutional arrangement, free-enterprise individualism was embodied most clearly. In the American Constitution of 1787 and the subsequent amendments to it, there are several provisions safeguarding, directly or indirectly, the right of private property and the freedom of capitalist enterprise. For instance, Section 10 of Article I prohibits states from enacting laws impairing the obligation of contracts; the Fifth Amendment prohibits the taking of private property for public use without due process of law or a just compensation. Many other provisions of the Consti-

tution have been interpreted by the courts as in every way protecting private-ownership interests. Gouverneur Morris, one of the authors of the Constitution, straightforwardly stated the purpose of the government created by the Founding Fathers: "Life and liberty were generally said to be of more value than property. Accurate view of the matter would nevertheless prove that property was the main object of Society... Men do not unite for liberty or life, they possess both in savage state in the highest perception, they unite for protection of property."[1]

The American Constitution was written by property-owners who were well aware of the aims of the form of government they created and the tasks it was to carry out.

1. THE RIGHTS AND FREEDOMS IN THE CONTEXT OF THE CONSTITUTION

It is noteworthy that no clauses guaranteeing citizens democratic rights were included in the text of the Constitution itself. This, among other things, speaks for the large degree of conservatism of the federal Constitution. While it was being drafted and discussed, the leaders of the American Revolution believed that the list of rights and liberties (a bill of rights) did not need to be included in it. They felt that the checks and balances in the separation of powers, practically enshrined in the Constitution, together with the three guarantees taken from British law—the writ of habeas corpus, prohibition of bills of attainder, ex post facto laws, and the granting of titles of nobility—would be sufficient to ensure law and order and fair government. Alexander Hamilton supported this position, writing that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[2]

Most American historians accept that the Founding Fathers regarded the rights of the individual as "natural," and therefore not requiring special enumeration in the text of the Constitution. They argued that such an enumeration would be seen as an exhaustive list of the rights and freedoms to be protected, thus leading to encroachments on the rights not listed. They also contended that these rights and freedoms were already guaranteed in state constitutions. However, behind such arguments lay the desire to curb the revolutionary process and restrain the radicalism of the masses, while the above prohibitive clauses included in the Constitution were to indicate the Founding Fathers' sufficient concern about constitutional guarantees of legality.

[1] *The Records of the Federal Convention of 1787*, Vol. I, ed. M. Farrand, New Haven, 1966, pp. 533, 536.

[2] *The Federalist*, p. 538.

The absence in the Constitution of an enumeration of federally guaranteed rights and freedoms caused severe criticism by antifederalists and by democratic-leaning state legislators. During the ratification in the states, the legislatures insistently urged that amendments be added to guarantee these rights and freedoms. Many politicians and average citizens were concerned, not without reason, that the absence of clauses in the Constitution expressly guaranteeing political and individual rights and freedoms would enable the federal government to impose limits on civil rights and freedoms at will.

Under pressure from the public, in 1789 the newly elected Congress considered amendments on political and individual rights proposed by the state legislatures. The reasons for doing so were to satisfy the minority opposed to the Constitution "that their liberties were not in danger" and "to guard against abuse of power by the central government."[1] The first ten amendments to the Constitution (the Bill of Rights) were ratified by the necessary number of states on Dec. 15, 1791.

The Bill of Rights was a product of the American people's widespread mistrust of government, with which they automatically associated authoritarian rule and the infringement of individual liberty. This mistrust was part of the historical heritage of the young bourgeois republic; still fresh in the minds of many Americans was the way the British crown had dealt with political and religious dissent in the colonies. The hostility toward British authority grew into mistrust of government in general, and in particular of the kind of strong, centralized government created by the Constitution of 1787.

Mistrust of government is clearly discernible in the clauses making up the Bill of Rights. Almost all of the Bill's amendments not so much stipulate the rights of the citizens but rather set the limits of government power in respect to them. The political rights and freedoms, central to American constitutionalism, were embodied in the First Amendment. These include such core freedoms of Western democracies as the freedom of speech, of the press, of assembly and religion, expressed in a categorical wording: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In Supreme Court interpretations, the combination of the two premises of the First Amendment, "an establishment of

[1] D. Hutchison, *The Foundations of the Constitution*, pp. 286-87.

religion" and "prohibiting the free exercise thereof," has come to form a positive proclamation of the freedom of conscience. We have not undertaken to analyze the freedom of religion in the U.S.A. The Constitution makes no mention of such important political rights as the right to form unions and freedom of association, yet citizens are regarded to be "naturally endowed" with them, in direct accord with the spirit and letter of the First Amendment.

Clauses concerning the individual rights of citizens are contained in the Fourth, Fifth, Sixth and Eighth Amendments. The Fourth Amendment, for example, guarantees the inviolability of persons and their houses: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment sets down a number of important procedural principles designed to insure the administration of justice. Among them are that no person may be held to answer for a capital or other grave crime unless on presentment or indictment of a Grand Jury, that no person may be subject for the same offense "to be twice put in jeopardy of life or limb," that no one may be made to testify against himself, nor be "deprived of life, liberty, or property, without due process of law."

The Sixth Amendment proclaims the rights of the accused in criminal prosecution, providing grounds for the protection against the abuses of prosecutors. Accordingly, the accused has the right "to a speedy and public trial, by an impartial jury" "to be informed of the nature and cause of the accusation," to be "confronted with the witnesses against him," to call witnesses in his favor, and "to have the assistance of counsel for his defense."

Finally, the Eighth Amendment, the last of the amendments of the Bill of Rights concerning individual rights and freedoms, prescribes that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As a whole, the principles laid down in the Bill of Rights established guarantees protecting the individual from arbitrary rule which were entirely unheard of in Continental Europe, where at the time absolutism went unchecked.

However, neither the Constitution nor the Bill of Rights contains a clause guaranteeing the right to vote. Establishment of the procedures and conditions for the exercising of this key political right was left to the discretion of state governments.

The silence of the U.S. Constitution on this issue enabled the states to create refined systems of electoral qualifications which in effect limited voting to a relatively small group of the population—free white male propertied citizens. As a matter of fact, this arrangement fully accorded with the class views of the Founding Fathers on the nature of democracy and reflected their elementary fear of the masses and their reluctance to allow the people to take full part in the political process.

The gradual removal of class and racial restrictions on voting and the inclusion of federal guarantees of voting rights in the Constitution were the fruits of a relentless struggle by democratic forces for genuinely universal suffrage. Each change in the Constitution on behalf of expanded voting rights was met with fierce resistance by conservatives, reactionaries and racists.

It should be underscored that the prohibitions contained in the Bill of Rights initially pertained only to the federal government and did not affect the states. It was not until 130 years later, in 1925, that the Supreme Court ruled to include the First Amendment freedom of speech and the press "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[1] Federal guarantees of freedom of the press and of assembly, and also procedural rights, were later extended to the states in a similar fashion. As a result, the Fourteenth Amendment prohibition on the abridgment of citizens' rights was gradually, in the course of 150 years, extended by the Supreme Court to state governments.

The affirmation of personal rights and freedoms in the form prohibiting Congress from making any laws that would abridge them was a holdover from the days of the American Revolution, when constitutional theory assumed the "natural" origin of personal liberties. The Founding Fathers were of the belief that a verbal enumeration of "heavenly ordained" rights in the Constitution would result in the government being able at will to encroach upon the natural rights not listed therein. Therefore the Framers of the Bill of Rights, proceeding from the assumption that the legally guaranteed rights derived from a higher authority than that of the government addressed the prohibition on the enactment of laws abridging these rights to the government itself.

The principle of restriction on government power which is woven in the fabric of American constitutionalism was a practical expression of the ideas of political thinkers of the 17th and 18th centuries about the natural origin of individ-

[1] Gitlow v. New York, 286 U.S. 652 (1925).

ual rights and freedoms. The concept of natural rights was an ideological weapon of the bourgeoisie in their struggle to destroy the mainstays of feudalism and achieve power. Followers of the natural rights school (in America, Benjamin Franklin, Thomas Jefferson and Thomas Paine) based their belief on the view of man isolated, standing apart from society and the state. This assumption revolves around core concepts of the capitalist system, in which each individual upholds his interests in a contest with others. The natural rights school fostered the formation, expansion and legal protection of capitalist forms of enterprise and property. The democratic rights and freedoms derived from natural rights theories expressed the economic and political interests of the bourgeoisie who were constricted by feudal-absolutist patterns and sought to create their own form of government. The beliefs and principles encapsulated in the Bill of Rights thus clearly reflect the ideology of bourgeois individualism, central to which is the pitting of the individual against society and the state so as to protect above all the rights of property-owners. Hence limited government power enforced by various prohibitions in the spirit of constitutionalism.

In Western democracies, rights and freedoms of an individual are interpreted as the constitutionally guaranteed autonomy of an individual in respect to the state, society and other individuals, within the bounds of which the individual is free to assert his own political beliefs, align his actions with these beliefs, express his opinion on political issues, associate with other people to carry out political activities without restrictions or outside interference, count on the inviolability of his person and property and demand certain guarantees (due process of law) when accused of an offense.

However, the boundaries of this personal autonomy (which, contrary to natural law theories, are fixed by the government) are essentially identical to limits of political liberty in general. These boundaries characterize the degree to which capitalist society is democratic, the state of the political regime and, most importantly, determine the chances for working people under capitalism to assert their interests and develop and expand the democratic principles of constitutionalism.

There is no reason to doubt the progressive significance that the American Constitution, the first written constitution in the history of humanity, had for its contemporaries. The democratic ideas it embodied expressed the views of the leading bourgeois thinkers, politicians and legal scholars of the time. What's more, the U.S. Constitution came into being at a time when almost the entire civilized world was ruled by monarchies; the roots of republicanism could be found only in a handful of countries, such as the Netherlands and the city-republics in Italy and Switzerland. Licentious absolutism raged in the rest of Europe, and it remained repressive even if it styled itself enlightened absolutism. While arguments were raging in America over natural rights, the boundaries of freedom of the press and the right of a person to withhold evidence against himself, in czarist Russia, participants in the Pugachov Rebellion were being tortured and punished without investigation or trial, and in German mini-states a brisk trade was being conducted in soldiers. The American Constitution must thus be seen in the context of its time—as an indisputably democratic document, even before the ratification of the Bill of Rights. The U.S. Constitution was adopted by the Philadelphia Convention two years before the storming of the Bastille and at a time when no written document could be compared to the Declaration of Independence or the Constitution of 1787.

The Bill of Rights, adopted under pressure from below, was, nevertheless, but a concession by the nation's elite who fashioned its clauses to reflect their own views. Its underlying principles had already been enshrined in states' constitutional acts which expressed the democratic gains won by Americans in their war of independence and also the experience of the British bourgeoisie in their struggle with absolutism. In a certain sense the Bill of Rights was the product of legal standards instituted by citizens of the new republic themselves.

In this regard, Robert A. Rutland, an American historian, wrote: "Freedom of the press, religious freedom, free speech, and the other rights protected by the first ten amendments of the Constitution had a direct relation to events in the colonies prior to the Revolution. The revolt which loosened the bonds of restraint sped the process of enacting these guarantees into fundamental laws, and the various state declarations of rights resulted. Like all man-made laws, these bills of rights did not prevent some injustices. Nevertheless, they clearly demonstrated that the American Revolution had a broad ideological base and that it was not only a military, political, and social upheaval—but also a legal rebellion... A more dispassionate view now indicates that a broad base of public opinion forced the adoption of the Bill of Rights upon those political leaders who knew the value of compromise."[1]

The Bill of Rights thus expressed to the same measure the political interests of the propertied classes and the hopes and aspirations of the democratic populace. The principles encapsulated in this document, including those concerning political rights and freedoms, were rooted in the democratic

[1] Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, Collier Books, N. Y., 1962, pp. 220-21.

traditions of Americans and were fashioned into a democratic form.

The real embodiment of the precepts of constitutionalism in the sphere of rights and freedoms is an issue around which a continuous struggle has been waged in the United States between the democratic public and conservative-reactionary elements. American history bears witness to the fact that the realization of the rights and freedoms conceived and interpreted by the architects of the Bill of Rights as "naturally belonging to man" has always been attended by acute political confrontations, whether on the streets during demonstrations or encounters with the police or on the pages of elite academic journals, during heated debate in legislatures or during argumentation in the formal atmosphere of a courtroom. Behind these confrontations has inexorably stood the question of the nature and limits of rights and freedoms of an individual.

2. PROCEDURAL GUARANTEES OF JUSTICE AND INDIVIDUAL RIGHTS: DEFORMATION OF CONSTITUTIONAL IDEALS

Altogether, the constitutional principles formulated in the Bill of Rights make up a code of general guidelines for the functioning of criminal justice and the protection of the rights and legitimate interests of individuals. The Bill of Rights grants exceptionally large attention to procedural guarantees of justice and individual rights. This is explained by the fact that, when the nation's body of law was being compiled, based largely on British patterns, the American mind still seethed with hatred of the judicial tyranny of the Stuarts, who under the veil of legal procedures dealt savagely with religious and political opponents. The authors of the Bill of Rights therefore built restraints around the government's law-enforcement and judicial activities, designed to guarantee justice and protect the individual from abuses of power that were so common under the monarchies of the Old World. In laying the foundations of a bourgeois-democratic legal system, the Framers of the new government, nonetheless, reverted to old forms and institutions familiar to them from British law and transplanted them onto American soil. Some institutions were exact replicas of their Anglo-Saxon counterparts, and others were modifications adapted to American conditions.

The constitutional *principle of the inviolability of a person and his home* derives from the provisions of the Fourth

Amendment which, like other provisions of the Bill of Rights, were a product of the historical experience of Americans and their propertarian, individualistic notions about relationship between the individual and the government.

"Every man's house is his castle" is a maxim much celebrated. The English statesman William Pitt, Sr., speaking in Parliament in 1763, elaborated on the idea, "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."[1]

Americans were aware, however, of the many abuses of royal power. In Britain, so-called general warrants, which did not specify the person subject to arrest or the place of search, were widely employed by agents of the crown in mass round-ups, arrests and searches directed against political opponents, while in the American colonies, British authorities issued "general warrants" good for an unlimited time for searches of homes and businesses under the pretext of discovering contraband goods. The Fourth Amendment was designed to preclude the abuses of power by the government which the colonists and their ancestors back in England had so frequently encountered.

Besides, the Fourth Amendment, together with other provisions of the Constitution, embodied the idea of the inviolability of private property. The principle expressed, among other things, in the ban on trespass without the consent of the owner or without lawful cause, is a tenet of common law. The interpretation of the Fourth Amendment as protecting private property has been developed by the Supreme Court in a number of its major decisions.

Over time the Supreme Court began to interpret the Fourth Amendment as protecting not only, and even not so much private property (its inviolability is sufficiently guaranteed by other constitutional provisions), but the privacy of citizens, the freedom from excessive and unlawful intrusion by the government in their private affairs. The development of the concept of the right to privacy does not contradict the Fourth Amendment's protection of property interests, as these interests are an integral part of privacy.

The right to the inviolability of person, house, papers and personal effects was proclaimed in a purely declarative form; unlawful searches and arrests in violation of this right were prohibited. A search or arrest is lawful if a warrant has been issued theretofore. The lawfulness of a warrant

[1] Cited in *The Constitution of the United States of America. Analysis and Interpretation*, p. 1041.

in turn depends upon "probable cause", supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment does not specify with whom lies the responsibility for the issuing of warrants or who shall determine whether a "probable cause" does exist, who executes the warrant, how detailed the description of the place to be searched or the persons or things concerned must be, or how absolute the rules are and whether they allow for exceptions. In other words, the Constitution does not establish firm criteria of the grounds for searches or arrests. The specific interpretation of ambiguous formulations was left to the legislature and the courts. That is why over the course of U.S. history the effective content of the Fourth Amendment constantly changed, and the real significance of the guarantees of the inviolability of person and property was largely determined by law-enforcement agencies—the police, prosecutors, investigative bodies, etc.

The procedures for issuing warrants as established by legislation and judicial practice are as follows. Given "probable cause" for charging a person with a criminal offense, an officer of the police or other investigative body compiles a request for the issuance of a warrant for the arrest of a particular person or a search of his premises. The request is submitted under oath to a magistrate, who must ascertain that probable cause exists before issuing the warrant. Upon the magistrate's approval, the warrant is executed by the police.

American criminal law assumes that the issuance of warrants by a "neutral and detached magistrate" ensures the adherence to the constitutional requirement that "probable cause" be present for the filing of criminal charges and conducting searches and arrests. It also assumes that magistrates are able to make decisions on the matter in an objective, impartial, neutral way, which cannot be done by the police or prosecutors by virtue of the nature of their offices. The Supreme Court has formulated this idea as follows: "The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint ... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime... The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause."[1]

The courts have taken a clear stand on the question of who has the power to issue warrants. The Supreme Court has re-

[1] Giordenello v. United States, 357 U.S. 480 (1958).

peatedly ruled that this power belongs to magistrates. In doing so, the Court has cautioned magistrates against becoming "rubber stamps" that automatically approve warrant requests of the police and prosecutors. And it has ruled unconstitutional state laws authorizing prosecutors to issue arrest and search warrants.

Notwithstanding formal guidelines, the procedures for issuance of warrants are quite different in reality. In fact, the decision of the police and prosecutor determines the sanctions to be issued by the magistrate, rather than the reverse. The issuance of a warrant by a "neutral and detached" magistrate more often than not boils down to the formal (and automatic) approval of the prosecutor's decision to charge the suspect with a crime.

In an overwhelming majority of cases the police seek the informal approval of the prosecutor's office for a warrant request before submitting the request to a magistrate. At the federal level the approval by prosecutors of requests for the issuance of warrants has become a firmly entrenched practice. In some states the law directly requires the prosecutor's preliminary approval of warrants.

The obedient following by magistrates of police and prosecutor recommendations for the issuance of warrants is also a result of the vagueness of the constitutional requirement of "probable cause."

The criteria of "probable cause" for the issuance of an arrest or search warrant have yet to be crystallized in American law. The Supreme Court has held, for instance, that a decision on whether "probable cause" is present should be based on probabilities which technically have no legal bearing.

In most cases arrest or search warrants are issued on the basis of unverified evidence submitted by the police or obtained from police informers. The identity of the informer is usually not revealed in warrant requests. Instead, it is enough that the police affirm that the informer is reliable and has supplied truthful information in the past. A warrant request may also be granted on the basis of hearsay, that is, secondhand information.

The vagueness of the criteria for determining probable cause for an arrest or search warrant, largely based on unverified incoming information, presents vast opportunities for the abuse of power by the police.

The apparently unequivocal Fourth Amendment requirement that a warrant be issued in order to conduct a search or arrest has exceptions legalized by law and court practice and explained by practical necessities in the fight against crime. Under a general rule reinforced by common law, state legislation and federal laws, an officer of the law has the

right to arrest a person without a warrant if the officer is a witness to the crime or if at the time of the crime the officer has sufficient grounds to believe that that person committed the crime. Legislation of the states in principle limits the authority of the police to make an arrest without a warrant only to cases when a felony has been committed. However, they have the unconditional right to arrest without a warrant people whose actions in their opinion "disturb the peace," which under law is only a misdemeanor. An arrest for "disturbing the peace," the grounds for which are determined by the police arbitrarily, is a forceful weapon in the hands of law enforcers that is employed readily and on a wide scale against various types of "undesirable" elements and in particular against participants in mass protests. There is an observable trend in the United States toward the expansion of police powers to arrest people for any misdemeanor without a warrant.

A "lawful" arrest of a person, with or without a warrant, enables the police frisk the suspect and his belongings under his immediate control. Such searches usually go beyond the bounds of what is necessary and often end in mistreatment and humiliation of the suspect. In various rulings the Supreme Court has affirmed the right of the police to search without a warrant premises in which a "lawful" arrest has been made. The Court's position on this issue contradicts the Fourth Amendment requirement on the matter, but the justification is put forward that this power is needed to seize items that may likely serve as evidence.

The American police with growing frequency conduct searches without a warrant but with the "consent" of the owner of the property. The record shows that such searches are more often than not deceptively inspired by the police themselves, who prefer not to mention that the citizen has the right to insist on a warrant. In 1973 the Supreme Court ruled lawful searches made without a warrant but with the permission of the suspect, which, were he to refuse, would be unconstitutional. What's more, the Court ruled that in asking the consent of the suspect, the police are not obliged to inform him that he has the right to refuse; the police must merely show that permission was "voluntary," that is, not given under duress (*Schneckloth v. Bustamonte*).

The courts take a lenient attitude to the practice of police searches of automobiles in the absence of a warrant after the automobile's owner has been arrested—either on the basis of a warrant or without one. This practice has been "legalized" by court decisions even though under American law the automobile is a constitutionally protected object (along with the house, apartment, office, hotel room, etc.), the search of which must be conducted in accordance with the requirements

of the Fourth Amendment. In 1982 the Supreme Court ruled lawful the actions of the police who, tipped by a "previously reliable informant" over the telephone, stopped the automobile driven by the named person, detained him and conducted a thorough search of the automobile. The police acted without a warrant. In the minority opinion, Justices Thurgood Marshall and William Brennan declared that "the majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself." Commenting on the case, the noted constitutional and criminal defense lawyer William Kunstler wrote that "Burger & Company squeezed the last juices out of the Fourth Amendment, where automobile searches were involved."[1]

In various combinations—a warrantless arrest but on the basis of a "lawful" search, including one made without a warrant, a warrantless search but on the basis of a "lawful" arrest, including one without a warrant—police can make searches and arrests without a warrant in circumvention of the Fourth Amendment requirements, although "legally," that is on the basis of various rules established by law or fixed by court decisions.

"Legal" opportunities for the police to circumvent constitutional guarantees of legality and probable cause for searches and arrests occur most frequently during times of political tension and mass protest campaigns: the police resort to brutality and unjustified violence during arrests and launch mass arrests. The legal norms regulating the procedures for searches and arrests are not a hindrance to police abuses during either the investigation of a crime or suppression of a political protest.

The Fourth Amendment establishes the precise requirement that search or arrest warrants must indicate the person to be arrested and a detailed description of the place to be searched and the items to be seized. However, this constitutional requirement has been distorted by the law, court decisions and police practices. According to the Rules of Criminal Procedure for the United States District Courts, an arrest warrant "shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty."[2] These, in effect, blanket warrants permit law enforcement officers to abuse their power of arrest. A comparison of a blanket warrant with the constitutional requirements prompts the con-

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1 *Guild Notes*, Vol. XI/No. 4, September-October 1982, p. 8.

2 *Rules of Criminal Procedure...*, October 1, 1984, The Committee on the Judiciary, House of Representatives, U.S. Government Printing Office, Washington, 1984, p. 2.

clusion that such a warrant is just as good as no warrant at all.

The requirements established by the Rules of Criminal Procedure in respect to searches and seizures are formulated in such a way as to provide law-enforcers with vast leeway in executing them. For instance, it is permitted to "seize any property that constitutes evidence of the commission of a criminal offense."[1] In a 1967 ruling, the Supreme Court diluted the force of the Fourth Amendment requirement that a search warrant contains a detailed description of the property subject to seizure by allowing the police in the course of a search to seize any items not listed in the warrant they believe may serve as evidence in another case, not connected with the case for which the warrant was issued.[2]

The idea of "general warrants" and "general searches" which the Framers of the Bill of Rights were opposed to in drafting the Fourth Amendment can today be seen rather vividly in statutes and the everyday operations of the police.

The unconstitutional idea of "general searches" is manifested most tangibly in the practice of electronic eavesdropping on private conversations. The Founding Fathers could not imagine that the guarantees of legality and the requirement of probable cause would become the focus of acute disagreement among legal scholars, the courts and politicians over constitutionality of electronic surveillance. The scientific and technological revolution has brought amendments to law enforcement practice and constitutional doctrines. With the appearance of telephones, recording devices and advanced electronics, the police and investigating bodies have found themselves better equipped both to combat crime and to keep close watch over political dissidents. Technological eavesdropping, the essence of telephone tapping and electronic surveillance, is widely used in criminal investigation and domestic intelligence and has become an effective means for government intrusion upon privacy, that constitutional right which has for so many years been jealously defended by lawyers, the courts and academia.

With the introduction of eavesdropping and surveillance in law enforcement, many jurists have begun to contend, not without reason, that such practices essentially differ little from searches ordered to seize criminal evidence. They argue that constitutionally eavesdropping should be made equal to searches and seizures and should come under the terms of the Fourth Amendment. Opponents of eavesdropping argue that it is unconstitutional on the grounds that it represents a "general search," since in the course of eavesdropping it

[1] *Rules of Criminal Procedure...*, p. 34.
[2] Warden v. Hayden, 387 U.S. 294 (1967).

is impossible to tell beforehand which conversation or part thereof may prove incriminating and subsequently be used as evidence. In other words, even if eavesdropping were to be accepted as a "search" under the Fourth Amendment, it would be simply impossible to include in the search warrant a detailed description of the property subject to seizure, as eavesdropping is unselective and is conducted blindly until the conversation of interest to investigators can be pinpointed. That is why opponents of eavesdropping consider it to be a dangerous and refined tool for intrusion into constitutionally protected privacy.

The backers of eavesdropping, however, point to its effectiveness against crime and, in particular, against organized crime.

As illegal crime syndicates were just becoming established, the Supreme Court heard its first case involving the interpretation of eavesdropping as the equivalent of search and seizure within the context of the Fourth Amendment. In *Olmstead v. United States*, heard in 1928, the Supreme Court refused to apply the search and seizure clause of the Fourth Amendment to eavesdropping and ruled that warrantless searches and seizures cannot be considered unconstitutional if they do not involve trespassing and the seizure of material objects.

The Supreme Court's ruling reinforced the "legal" basis of eavesdropping. Although the Federal Communications Act of 1934 made it illegal for private parties and for officials to eavesdrop on telephone conversations with the aim of divulging the contents of the conversation, the U.S. Department of Justice interprets the 1934 Act as prohibiting eavesdropping only when the contents of the conversation is divulged to "unauthorized persons." The Supreme Court has never clarified the restrictions imposed by the Act. Thus the increasing use of eavesdropping has continued unabated, especially by the investigative agencies for political purposes.

The Federal Bureau of Investigation has been particularly energetic in its resort to eavesdropping. Until the late 1960s, it carried out eavesdropping without legislative sanction, operating on the basis of secret presidential instructions. In a secret memorandum dated May 21, 1940, President Franklin D. Roosevelt authorized Attorney General Robert Jackson to allow the F.B.I. to tap telephone conversations of persons under investigation on suspicion of subversive activities against the United States. This and subsequent instructions by the President and the Attorney General enabled the F.B.I. to expand its spying operations within the country to cover new elements termed "subversive." Its primary target was the U.S. Communist Party, against which F.B.I. Director J. Edgar Hoover directed his agency with particular zeal.

In the 1960s and 1970s the F.B.I. conducted intensive surveillance of black, antiwar and student organizations. It resorted to every means possible, many of doubtful legality, including electronic surveillance and telephone tapping.

By the mid-1960s, more than 60 executive branch agencies were actively using electronic eavesdropping devices for various types of surveillance.[1] Electronic surveillance took on a large scale.

In 1967, after many years of tacit approval of eavesdropping, the Supreme Court changed its position. In *Katz v. United States*, the Court ruled that the Fourth Amendment "protects people, not places," from unjustified searches and seizures and that the use by the police of electronic tapping constituted a "search and seizure" within the meaning of the Constitution. That same year the Court struck down a New York state law on the grounds that its language was too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area (*Berger v. New York*).

The Supreme Court in its rulings has never held unconstitutional eavesdropping per se, but has merely indicated that if it constitutes "search and seizure" under the Fourth Amendment, then it must meet the Fourth Amendment requirement for the presence of "probable cause" before a court warrant is issued.

In 1968 eavesdropping was sanctioned by law. Congress passed the Omnibus Crime Control and Safe Streets Act, which set down rules regulating the circumstances under which eavesdropping was allowed on conversations of persons suspected of having committed a felony. But under that law, eavesdropping could be carried out only after a warrant was obtained, in which the "probable cause" must be stated. The law allowed for warrantless eavesdropping with the sanction of the President or the Attorney General in "exceptional circumstances" or when the "national security" was threatened.

The Nixon Administration interpreted the "national security" clause broadly, extending it to the activities of radicals and political opponents. Eavesdropping was used by the government on an even larger scale against antiwar activists and members of civil rights organizations.

In 1972 the Supreme Court was forced to declare unconstitutional eavesdropping sanctioned by the President and used under the pretext of protecting "national security" against persons suspected of "subversive" activities. The Court ruled that in such cases investigators must obtain a court warrant, although it left intact the President's power to approve eaves-

[1] Edith J. Lapidus, *Eavesdropping on Trial*, Hayden Book Co., Rochelle Park, N. J., 1974, p. 12.

dropping in counterespionage operations (*United States v. U.S. District Court*).

In 1978 Congress, apparently in an attempt to preclude undesirable court precedents in this area, passed the Foreign Intelligence Surveillance Act, which required that a court warrant be obtained for eavesdropping for counterintelligence purposes. Such warrants are issued at the application of the Justice Department by a special federal court, which considers the applications in total secrecy. Since the law was enacted, not a single such request has been denied.

In assessing the legal restrictions on eavesdropping it is necessary to keep in mind not so much the scope of these restrictions (the record shows that law-enforcement agents have a relatively easy time convincing judges that "probable cause" exists for the installation of listening devices) as the fact that eavesdropping has become legalized and recognized as a fully constitutional means of gathering evidence. The "general warrant" which the Founding Fathers tried so hard to exclude from use in order to protect the people from arbitrary rule has become institutionalized in modern American constitutional practice with the arrival of advanced technology. Electronic surveillance over the public has become an integral part of the "American way of life." Clandestine eavesdropping erodes the bedrock of privacy, and general fear of government surveillance reduces to naught the public's ability to enjoy freely the political rights and freedoms granted to them by the First Amendment.

Among the procedural guarantees of justice and rights of an individual a special place is occupied by jurors, members of a grand jury or of a trial jury.

The *grand jury* is an expanded panel of jurors, distinct from a petit, or trial, jury, which is called to decide whether or not the defendant is guilty. Grand juries in federal courts are comprised of not less than 16 and not more than 23 jurors. Whereas trial juries decide the guilt of the defendant in trial courts, grand juries act as a collegial body for indicting persons suspected of having committed a criminal offense.

A grand jury is a remnant of medieval English forms of community participation in the administration of justice. In medieval England, a judge making regular rounds of the province assembled the most honorable local inhabitants and heard their complaints about local "wicked people," administering punishment to offenders on the spot. The grand jury, established by the U.S. Constitution, was intended to safeguard lawfulness at the stage of indictment of suspects and prevent the government's abuse of prosecutorial power. The Framers of the Bill of Rights assumed that this would be

guaranteed by the fact that indictment of an alleged offender would be in the hands of his supposedly impartial peers. The idea for sharing the responsibility for the criminal prosecution between the government and community representatives was derived from English law and, in particular, from the Magna Carta of 1215. Chapter 39 of this document states that "no freeman" shall be prosecuted "except by the lawful judgment of his peers."

The Fifth Amendment to the Constitution empowers the grand jury to indict suspects for "a capital, or otherwise infamous crime." Under current law, such crimes are generally known as felonies.

While originally the grand jury was seen as a means to protect citizens from arbitrary criminal prosecution and a jury of peers was thought capable of carefully weighing the accusations and preventing abuse of power by the prosecution, today the grand jury is taking on quite the opposite image: most Americans would generally concede that it has been transformed into a subservient tool of the government prosecution. Observed Federal Judge William Campbell: "Today, the grand Jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at anytime, for almost anything, before any grand jury."[1]

Manipulation of the grand jury by the government has been made possible by existing legal procedures and the actual settings within which it operates.

It is convened by the court at the request of the prosecution. In theory, jurors are selected at random. To select jurors, court officials use such devices as voter registration lists, telephone directories, etc. But in reality, the supposedly random selection process produces results which clearly witness that in present-day America, the Anglo-Saxon ideal of indictment by peers remains an unfulfilled promise. More often than not, grand juries are formed almost exclusively from members of the elite of society.

Grand juries carry on their business in closed hearings, no records exist, the judge does not participate. During hearings witnesses are denied the right to be assisted by an attorney; the only person the jury is allowed to consult is the prosecutor. The grand jury may subpoena a witness without announcing beforehand the reason for doing so, may ask any question, irrespective of whether it has a bearing on the case, and may accept information based on hearsay. Any witness who refuses to testify may be prosecuted for "contempt of the Grand Jury" and serve time in jail.

The prosecutor wields significant influence over the grand jury. He may decide the question of whether the jurors are

[1] *Newsweek*, August 22, 1977, p. 46.

to be convened, may circumvent the grand jury entirely by drawing up the charge in such a way as to bring the defendant to trial on the basis of "information" drawn by the prosecutor alone. Also, it is the prosecutor who drafts the indictment and approves it finally by signing the resolution of the jury.

Prosecutors sometimes violate the secrecy of grand jury hearings for political purposes, publicly disclosing facts of the case or arranging leaks of information designed to discredit or compromise specific persons. It is a well-known fact that the Department of Justice widely uses grand juries to harass progressive elements, radicals and antiwar activists.[1]

In recent years calls have been made in the United States for the reform or total abolishment of the grand jury. These calls for reform were motivated ostensibly not so much by an aversion for the grand jury's role in harassing the political opposition as by the fact that its ever more frequent prosecution of white-collar crime has begun to irritate the American corporate elite. However, the total abolition of the grand jury appears unlikely, since at the federal level this would require an amendment of the Constitution. What's more, prosecutors are vigorously opposed to any reform that would strip them of a rather effective tool of law-enforcement policies.

The *trial jury* is a central feature of American constitutionalism in criminal justice and is considered a *sine qua non* of a "fair" trial and a manifestation of the democratic nature of the criminal procedure. The right of a defendant to a trial by jury has been recognized by the Supreme Court as "fundamental" and is a key ingredient of the "due process of law"; this right is guaranteed to defendants in state courts through the Fourteenth Amendment to the Constitution. Borrowing the idea of trial by jury from English law, the Founding Fathers saw in this arrangement a way to insure justice and prevent judicial tyranny in the newly formed republic: "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[2]

Trial by jury was incorporated in the Constitution not only as a means for citizens to participate in the administration of justice but as a form of public distrust in the courts as a government institution. The function of the jury is to decide whether or not the defendant is guilty of the crime charged. After studying the evidence presented by the prosecution and the defense, weighing their arguments and hearing the testimony of witnesses and experts, the jury renders its decision

[1] See, for example, Leroy D. Clark, *The Grand Jury. The Use and Abuse of Political Power*, Quadrangle, N. Y., 1975.

[2] Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

in the form of a verdict. Upon announcement of the verdict, the judge makes a sentencing decision and proclaims the sentence at a separate session.

To determine the extent to which trial by jury as it is practised today in America corresponds to the constitutional model of it, we need to examine the legal rules regulating juror performance.

The Founding Fathers designed trial by jury proceeding from its traditional attributes as they took shape during the evolution of common law: the panel of jurors should be made up of 12 people, the jury's verdict must be unanimous, and jurors participate only in trials and not during appellate hearings.

The basis of this pattern was undermined by the present conservative Supreme Court. In the 1970 case of *Williams v. Florida*, the Court rejected the argument that the 12-man jury was part of the common law heritage, ruling that a 12-man panel was a "historical accident" and not a necessary ingredient of trial by jury as prescribed by the Sixth Amendment. The Court refused to fix a mandatory size for juries, but upheld a Florida state law that established a jury of 6.

In 1972 the Supreme Court attacked another key element of trial by jury, the rule requiring that all jury verdicts be unanimous. The Court's decision in *Apodaca v. Oregon* did not affect the unanimous rule in federal courts but recognized the right of states to set by themselves the number of votes required for a verdict. This decision was motivated by pragmatic considerations: juries function smoothly when jurors remaining in the minority are unable to block the verdict. In making this ruling, the Supreme Court severely undercut the significance of a key principle of justice: that the guilt of the accused must be proven "beyond reasonable doubt." Unanimity of the jury in issuing a verdict is a formal expression of this principle—dissent of even one juror means that "reasonable doubt" does exist. Abolition of the requirement of unanimity makes it easier for the prosecutor to prove the guilt of the accused. In addition, on a jury dominated by white, middle-class jurors, the absence of the unanimity requirement makes it possible for the majority to disregard the opinion of a minority made up of members of the lower class or ethnic minorities.

The Constitution speaks of "impartial jurors." In theory, the impartiality of the jury is insured by the "impartial" selection of jurors. In the United States, the selection of citizens for jury duty is done by special court officers who pick potential jurors from voter registration lists (the primary method in the federal courts), telephone directories, lists of taxpayers and car-owners, etc. People whose job requires their continual presence at work are automatically

exempted from jury duty. The remainder are interviewed by the judge with the aim of determining which ones have a legitimate excuse for being exempted from jury duty for personal reasons. Those not exempted at this stage are assigned to specific cases.

Before the trial actually starts, a panel of jurors must undergo final screening, called *voir dire*. Jurors are questioned by the prosecutor and the defense attorney who may reject specific jurors on the ground that their prior knowledge of the case, personal attitudes, religious beliefs or social affiliations make them prejudiced toward the defendant or unable to rationally weigh the circumstances of the case.

Voir dire is theoretically supposed to insure the selection of a panel of "impartial" jurors. In fact, however, the questioning process fails to guarantee the selection of "ideal" jurors. On the contrary, it offers each of the parties a chance to discredit potential jurors undesirable for it and to stack the panel with jurors thought to be favorably disposed to their side of the case.

Despite the appearance of being neutral, the jury selection process, for all its three or four stages, is full of loopholes presenting opportunities for discrimination against ethnic minorities and the lower class. The overview of the American criminal justice suggests that the jury participation does not necessarily guarantee a fair trial for the minorities and the poor: "American juries are composed not of their 'peers' but of middle-class whites with racist attitudes who are predisposed to find them guilty... Not only does such a practice create juries that are unrepresentative of the community, but the class bias influences decision making within the jury room."[1]

American scholars maintain that participation of jurors in trial proceedings the way it is prescribed by law and carried out in practice helps little to achieve the aims of justice or securely protect the rights and interests of the accused. In the opinion of Professor Weinreb, a legal scholar, "Once regarded as responsible citizens of the community whom the lawyers served, jurors are now credited with small intelligence of their own and must submit to the lawyers' efforts to manipulate them."[2]

In the American criminal process, jurors play a very passive role. In fact, it could be said that they are mere spectators of the courtroom "combat" between the prosecution and the defense. Although their function is supposedly to be

[1] George F. Cole, *The American System of Criminal Justice*, Duxbury Press, North Scituate, Mass., 1979, p. 351.

[2] Lloyd L. Weinreb, *Denial of Justice. Criminal Process in the United States*, The Free Press, N. Y., 1977, p. 104.

"judges of facts," during the trial they rarely ask questions, do not persist to examine evidence. Before retiring to the jury room to decide on a verdict, jurors receive instructions from the judge containing a summary of the legal aspects of the case and the judge's opinion on the credibility of evidence and the witnesses' testimony. And although the judge is obliged to point out to jurors that they are not bound by his opinion, the instructions unavoidably serve to manipulate the supposedly impartial jurors.

Finally, the defendant can waive his right to a trial by jury. By pleading guilty he can avoid any trial. Considering that 90 percent of all criminal cases in the United States end with the defendant pleading guilty (in most cases a plea is the result of a bargain with the prosecution), it can be stated that the idea of trial by jury so applauded by the extollers of American constitutionalism has but a symbolic relation to the way criminal justice system functions in real life.

The *right of the accused to a defense* in a criminal prosecution is guaranteed by Article VI of the Bill of Rights. It states that the accused has the right to be informed of the nature and cause of the charges, be confronted with the witnesses against him, obtain witnesses in his favor and have the assistance of counsel for his defense.

Like any other premise of American constitutionalism, the right of the accused to a defense is materialized in decisions of the U.S. Supreme Court, statutes, the everyday activities of the courts and police, and in practical policies.

A person arrested for an offense is initially informed of the nature of the charges against him when brought before a magistrate court for preliminary hearing. At this point the magistrate decides whether probable cause exists to call for a trial. The preliminary hearing is held in the presence of the accused and his defense counsel, who have the right to question witnesses and examine other evidence. In reality, however, in many instances the preliminary hearing is a mere formality, for at this stage a careful preparation of the evidence and a detalization of the charges are not required. In the typical preliminary hearing, the prosecutor presents one or two witnesses who are questioned only briefly by the magistrate and hardly at all by the defendant and his defense counsel. According to a study by the American scholar F. Miller, more than two-thirds of all defendants do not believe that preliminary hearings protect their rights and therefore waive their right to such a hearing.[1]

[1] F. Miller, *Prosecution. The Decision to Charge a Suspect with a Crime*, Little, Brown and Co., Boston, 1974, p. 84.

The accused has another chance to learn of the charges against him at the next stage of the criminal court process—at the arraignment hearing, at which he is read the charges as drawn by the grand jury or the prosecution and is handed a copy of the document. An indictment only states the charges in general language, without attempting to provide the accused with a full understanding of all facts relevant to the charge and the evidence of the prosecution. The charges contained in the indictment do not necessarily have to be supported by the references to concrete evidence. The indictment also makes no reference to evidence that might mitigate the guilt of the accused. Here it should be noted that in the United States, the job of prosecutors goes no further than the presentation of incriminating evidence.

Under American criminal law the defendant is not entitled to see all the materials of the case until the case is brought to trial, leaving it to the prosecutor to decide whether or not to disclose to the defendant all the evidence against him. To disclose some portion of evidence is a good will gesture of the prosecutor, but not his duty. But whatever the case, the defendant can never be shown the testimony of prosecution witnesses.

Thus, the American adversary criminal procedure establishes the principle of "good will" disclosure of evidence, and the defendant is placed in a situation where he can be informed of "the nature and cause of accusation," the evidence of the prosecution, only during the trial. The prosecutor usually withholds his key evidence and discloses it during the trial "at a moment," the Soviet scholar K.F. Gutsenko notes, "when it is necessary to inflict an unexpected blow on the defendant and paralyze his ability to defend himself. This is not an anomaly, but by American standards a normal occurrence: a contest is a contest, and if you want to win it, don't reveal to the opponent all your trumps at once."[1]

Given that the Sixth Amendment states that "in all criminal prosecutions" the accused has the right to be informed of the nature and cause of the charges against him, these practices in the American judiciary system look quite dubious from the point of view of the Constitution.

The right of the accused to confront the witnesses against him derives from the principle of direct access to evidence in criminal cases. In theory, this means that the accused can personally confront witnesses for the prosecution, object to the calling of certain persons to testify, question the witnesses and refute their testimony at any stage of the criminal

[1] K.F. Gutsenko, *Criminal Law of the U.S.A.*, Moscow, 1979, p. 152 (in Russian).

prosecution. However, it is not unusual for prosecutors to save key witnesses for the trial. In violation of the right to prepare a defense, the accused cannot count on seeing the testimony of prosecution witnesses until the trial.

It should be noted that even in the courtroom, the defendant is usually passive, which is a result of the pattern of the process. And although in theory the defendant has the right to examine witnesses in the course of the trial, he is rarely very active. Observes Lloyd L. Weinreb: "The defendant has almost no role... He may not personally challenge a witness, or contradict him, or ask for detail. The defendant's constitutional right 'to be confronted with the witnesses against him' is interpreted narrowly and technically as a right to know the state's evidence and cross-examine its witnesses."[1]

The right of the accused to have the assistance of counsel is idealized variously in American jurisprudence; it is considered almost as the chief attribute of the American "adversary" justice, resting on the precept of the equality of the parties in the judicial process. Yet, until the 1930s, the Sixth Amendment clause guaranteeing the accused the right to "have the assistance of counsel for his defence" had never been given a Supreme Court interpretation and was specified in federal legislation only to the extent that it guaranteed every defendant wishing to retain an attorney and able to afford one, the right to have it. Throughout American history, the right to a legal defense hinged on the ability of the defendant to pay for such services. Speaking at a hearing of a Senate subcommittee dealing with constitutional issues in September 1984, Deputy Attorney General Carol E. Dinkins called the idea that "each party to litigation bears its own legal expenses" a "traditional American rule."[2]

The Sixth Amendment is comprehended as not requiring the mandatory participation of the defense attorney in proceedings; the accused, no matter what crime he is accused of, may waive his right to the assistance of an attorney and defend himself, even if he conducts his defense to his detriment.

Until the 1960s, the states could freely regulate by law the participation of the defendant in criminal proceedings. A state court was prohibited only from denying the accused the right to a defense attorney should he request one and be able to pay the costs. Defendants unable to afford an attorney were provided with one free only in capital cases.

[1] Lloyd L. Weinreb, *Denial of Justice*, p. 111.

[2] *Statement of Carol E. Dinkins, Deputy Attorney General, Before the Subcommittee on the Constitution, Committee on the Judiciary, the U.S. Senate, Concerning S. 2802 The Legal Fees Equity Act*, September 11, 1984, U.S. Department of Justice, p. 1.

In 1963 the Supreme Court in its decision of *Gideon v. Wainright* extended the principle of defense attorney participation in the federal court proceedings to state courts, thereby mandating the states to allow defense counsel participation in all types of cases. Indigent defendants were henceforth to be provided with defense counsel free of charge.

In its interpretation of the Sixth Amendment guarantee of the defendant's right to counsel, the Supreme Court developed the concept of a "critical stage" in the criminal process, where the attorney's participation is necessary in order to protect the rights of the accused and to secure a "fair trial." It defined several "critical stages": the period from the arraignment to the beginning of the trial, the arraignment itself, the preliminary hearing, questioning of the accused by the police immediately after the arrest, and line-ups at the police station.

But in the 1970s, the Supreme Court substantially emasculated earlier precedents mandating the presence of the defense attorney at pretrial procedures. In a major case, *Kirby v. Illinois*, heard in 1972, the Supreme Court overturned an earlier ruling in which police line-ups were considered to be the "critical stages," ruling that the right to an attorney did not extend to preindictment line-ups, and that the Sixth Amendment guarantees did not become operative until the initiation of "adversary judicial criminal proceedings."[1] In the 1972 case of *United States v. Ash*, the Court specified that the right to counsel extended only to "pretrial events that might appropriately be considered to be parts of the trial itself."[2] On the basis of these and other rulings, and given the Supreme Court's present conservative make-up, it is not difficult to predict further drift of the Court in the direction of limiting the right of defendants to consult with an attorney during police interrogation.

Another cause of courtroom compliancy on the part of the defendant is that during the trial, the defense attorney often assumes an inflated role in the courtroom argument with the prosecutor, leaving the defendant no other choice than to entrust his entire defense to his lawyer. "Defense counsel rarely has the time or inclination to consult with his client on strategic matters or to respond to his suggestions... The defendant's hard-won rights to keep silent and to be advised and represented by counsel have become effectively a barrier to his participation in his own trial, justified on the ground that he has a lawyer to defend him."[3]

To judge the effectiveness of the defense in criminal cases

[1] 406 U.S. 682, 689 (1972).

[2] 413 U.S. 300, 312 (1972).

[3] Lloyd L. Weinreb, *Denial of Justice*, p. 112.

in the United States and the real significance of the right of Americans to a lawyer, one should take into account the availability and the quality of the legal services for the population. The most skilled attorneys work for large law firms that do business with corporations and generally do not practise criminal law. Lawyers from offices that specialize in criminal law work for fees that far from every American can afford. Suits related to the interpretation of constitutional rights of a defendant are often taken up by liberal organizations like the American Civil Liberties Union or the Center for Constitutional Rights or law firms specializing in such suits. Free legal services of these organizations are offered only selectively and are not accessible to everyone.

Supreme Court rulings and federal legislation have mandated that indigent defendants (an overwhelming majority in the United States) must be provided a lawyer from among a pool of government-financed public defenders. Usually, public defenders are lawyers with little experience who receive modest salaries and who do not always display great interest in defending the poor. In the federal courts, too, the defense of indigent clients is financially unrewarding work for lawyers, as the federal government allocates very little money for such purposes.

In the mid-1960s, after considerable public pressure, legal assistance programs were launched in the U.S.A., providing legal assistance free of charge or at reduced rates. Congress passed more than 120 statutes authorizing the use of federal money to fund legal assistance. Yet these measures were short-lived. Taking over the reigns of the presidency in 1981, Ronald Reagan began to act on his pledges to cut social programs by scaling back federal legal assistance to the poor.

The current network of public legal aid is supported primarily by contributions from philanthropists and charitable foundations. The organizations making up this network are staffed largely by beginning lawyers who are enthusiastic about their work and dedicated to helping the poor but have little experience, are overworked and are sometimes unable to cope with their job. The effectiveness of the defense in criminal cases in the United States is directly proportional to the amount of money spent, as skillful lawyers cost big money. The upshot is that poor citizens today just as before cannot always count on qualified assistance of counsel for defense. The realities of the capitalist system erect obstacles for the exercise of the defendant's constitutional right.

Closely related to the right of the defendant to legal counsel is the *"privilege against self-incrimination."* This privilege arises from a Fifth Amendment clause prohibiting a

person from being compelled to testify against himself in a criminal case.

As initially interpreted by the courts, the privilege protected defendants from being forced to give self-incriminating evidence in a trial and entitled them to refuse to answer any question the answer to which might later be used against them. It is based on presumption of innocence, placing the burden of proof on the prosecution. The privilege against self-incrimination, as the Supreme Court has pointed out, "reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses."[1]

As a right stemming from the corresponding duty of the prosecution to prove the guilt of a defendant, the privilege against self-incrimination has become theoretically an ingredient of criminal justice. A witness may decline to answer any question that may directly or indirectly implicate him in criminal wrongdoing. However, it is the court that decides whether the grounds on which the witness refuses to answer are valid, based on the circumstances of the case, a reasonable assessment of possible future action against the witness because of his answer, the nature of the information demanded, etc. The court thus has the wherewithal to neutralize the witness's chances of invoking the Fifth Amendment.

The practice of plea bargaining, long a tradition in the American criminal process, seriously contradicts the privilege against self-incrimination.

Guilty plea is of crucial importance in the American adversary judicial system. It constitutes principal evidence sufficient to convict the defendant. The entrance of a guilty plea by the defendant obviates the need for a trial with the jury convened, the evidence studied, arguments by prosecution and defense, testimony by witnesses and victims, or experts voicing their opinions. The only thing that remains is for the judge to impose a sentence. The accused enters a guilty plea in approximately 90 percent of all criminal cases in the United States.

A plea of guilty by the defendant is usually a result of a deal negotiated by the defendant and his lawyer with the prosecutor. Under plea bargaining, the defendant pleads guilty to a lesser crime or to only some of the charges in exchange for a promise by the prosecutor to ask the judge for a reduced sentence. And although the law requires that the judge for-

[1] Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964).

mally checks that no assurances were given, judges know that without a promise of a reduced sentence deals would not make sense for the defendant, and in the overwhelming majority of cases they routinely follow the prosecutor's advice as to what sentence to impose.

It is in the interest of the prosecutor to elicit a confession of guilt from the defendant. A guilty plea means that the criminal suit brought by the government against the accused is settled, thus relieving the prosecution from the chore of compiling incriminating evidence and calling and preparing witnesses. A guilty plea is also a victory for the prosecutor, meaning the conviction of the defendant.

Thus, in the American adversary justice system, two contradictory phenomena coexist: the practice of plea bargaining initiated by the prosecutor on the basis of which deals are struck in the majority of cases, and the privilege against self-incrimination, arising from the rule of burden of proof, which a majority of defendants waive, opting instead for the practical expediency of plea bargaining.

The privilege against self-incrimination thus turns out to be nothing more than an unfulfilled promise, while the real situation resembles an assembly line of guilty pleas, the majority of which are obtained through plea bargaining. Lloyd Weinreb notes in this regard: "On any fair account of our actual practices, conviction by guilty plea is normal and a trial the exception. This reversal of the theoretical and actual models of our criminal process is the more striking because we are so fond of proclaiming it a mark of our civilization that the government is required to prove a person's guilt without assistance from him, by 'its own independent labors.'"[1]

It is critical for defendants to be able to use their privilege against self-incrimination during questioning by the police immediately after their arrest. The police have been known to resort to illegal methods to elicit a confession of guilt from the accused, such as "third-degree" questioning, psychological pressure, blackmail and threats. A confession of guilt elicited from the accused in such a manner can be entered into the case and serve as grounds for indictment and subsequent conviction. The Supreme Court until the mid-1960s refused to apply the Fifth Amendment clause prohibiting compelled testimony to cases involving the use of illegal tactics in police interrogation, but used other constitutional grounds to overturn several cases in which confessions were elicited through torture, "third-degree" questioning and other uses of force.

In 1966 in the *Miranda v. Arizona* case, the Supreme Court

[1] Lloyd L. Weinreb, *Denial of Justice*, pp. 71-72.

established general rules for the questioning of suspects based on the principle of the impermissibility of forcing a suspect to give incriminating evidence against himself. A detained suspect, before being questioned, must be informed of his right to remain silent; the police must further inform the suspect that he has the right to have a lawyer present at the questioning, that a lawyer will be appointed if the suspect is unable to afford one on his own, and that all evidence, if voluntarily offered, can be used against him in a court of law. The Supreme Court further ruled that the violation of this rule by the police would exclude any confession of guilt from the trial and lead to dismissal, even if other evidence of guilt in addition to the defendant's confession existed. This rule has become known as the "Miranda rule," and the notification of the suspect of his rights—the "Miranda warning." The Court's ruling that all illegally obtained evidence be automatically excluded from the cases is known as the "exclusionary rule."

The adoption of the Miranda rule provoked a sharp outcry from police officials, prosecutors and politicians who saw in tough police methods the sole dependable means for strengthening legal order. They accused the Supreme Court of leniency toward criminals, of hand-cuffing the police and allowing the possibility that a criminal would go free because of police failure to observe what was seen as procedural formalities.

The present Supreme Court has little by little stripped the privilege against self-incrimination of its importance relative to police questioning of suspects. For instance, the prosecution now may impeach the trial testimony of the defendant by disclosing, at the trial, statements made by the suspect during questioning even if the Miranda rule was violated and the statements were excluded.[1] Without formally abandoning the Miranda rule, the Court has moved to undermine it through rulings that expand the freedom of maneuver for police and the chances for law-enforcement agencies to disregard the exclusionary rule.

The Supreme Court evolved the exclusionary rule in several of its decisions. The rule requires courts, after evaluating the evidence compiled by the police and prosecution, to exclude all evidence obtained in violation of constitutional rules for conducting arrests, searches, seizures, questioning and line-ups. Often the exclusion of illegally obtained evidence results in the dropping off charges and the dismissal.

The exclusionary rule has come under fire from law experts, politicians and, naturally, the police. Opponents of

[1] See Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975).

the rule—and almost all of them are conservatives—have taken their case before the public with the help of disarming rhetoric: "Why free criminals only because a policeman made a procedural error?"

The advocates of expedient tactics for enforcing law do have some reason when they contend that police violation of procedural formalities should not result in the dismissals and release of criminals, that instead of making a fetish of the exclusionary rule there should be found means to curb police abuses, such as stronger disciplinary, administrative or civil actions.

Embracing these arguments, the Reagan Administration has launched a broad offensive against the exclusionary rule. In speeches by Administration officials, in recommendations presented by expert commissions and in legislative proposals, the argument has been advanced that the Miranda rule is unreasonable and that it hampers police in their fight against crime.

The concern for public safety so often expressed by law and order advocates masks their desire to beef up the law-enforcement apparatus through the expansion of its powers, and the procedural formalities which they hold in such contempt are in their totality the guarantees of justice that have kept in check the law-enforcement activities of the capitalist state. In a society torn by antagonisms, the extent to which the individual is shielded from intrusions by the state is a gauge of the democracy in that state's legal system. The current trend toward the weakening of such protection quite accurately characterizes the state of the U.S. legal system.

U.S. politicians who are opposed to the use of the exclusionary rule yearn to restrict the application of judicial review in general and deny individuals ready access to the courts for the protection of their rights.

The exclusionary rule is not a panacea from police abuses. Various studies have found that only about one percent of felony suspects within federal jurisdiction are absolved of all responsibility because of mistakes made in the course of preliminary questioning, and over half of those having their complaint of illegally obtained evidence granted by the court, were still convicted on the basis of other evidence. The exclusionary rule is thus not a firm guarantee against police lawlessness. Rather, it is a ritual designed to prevent the police and prosecutors from openly encroaching on the individual's right to be shielded from ungrounded searches and arrests and to invoke his privilege against self-incrimination.

In recent years, however, the government has been attempting with some success to lift even this more symbolic than real restraint on police action. In 1984 the Supreme Court ruled on two cases in favor of the Administration's

position on this issue. In *United States v. Leon* and *Massachusetts v. Sheppard*, the Court held that the exclusionary rule was not applicable when the police made a mistake "in good faith." The Reagan Administration has proposed similar wording in a bill it sent to Congress. Lawyers of the Left note that by citing "good faith" the police will be able to conduct arrests, searches and carry out other investigatory work without proper sanction, opening the door wide to potential abuses.

In the American criminal justice system, the granting of immunity from prosecution is often used to circumvent the privilege against self-incrimination. Under this practice, the state, ostensibly recognizing the indelibility of the constitutional privilege, offers a person immunity from prosecution in exchange for a pledge that he will not invoke his Fifth Amendment right to withhold self-incriminating evidence and provide valuable evidence against a suspect in a criminal case.

The institution of witness immunity has undergone a certain transformation in the course of the history of American law. In the century between 1860 to 1960, the Supreme Court repeatedly ruled absolute witness immunity to be constitutional. Once granted absolute immunity, a witness could not be indicted for any crime revealed during his testimony. The Organized Crime Control Act of 1970 (its sweeping language making it possible to apply it to any person, even having no connection with organized crime) limited the degree of immunity that could be granted. A witness granted immunity from prosecution no longer received a general pardon for crimes revealed in the course of his testimony; the state merely promised that the information provided by the witness would not be used against him "directly or indirectly." In fact, prosecutors are not bound by their pledge. Once an investigator knows that a crime was committed, by whom, when and where, he can considerably narrow the scope of his inquest. With a little imagination and effort, he can then nail down an independent piece of evidence. Under these circumstances, the prosecutor can show without particular difficulty that the evidence possessed by him was gained independently, leaving the burden on the court to prove that the prosecution's evidence was "the fruit of a poisoned tree." In addition, the facts the witness was obliged to reveal under the terms of immunity agreement become part of a secret file kept by investigators which they later use to carry out clandestine surveillance.

The Supreme Court ruled that "limited immunity" did not run counter to the intent of the Fifth Amendment privilege against self-incrimination, and that a witness can be compelled to give evidence with "limited immunity" granted.

This kind of immunity seriously undermines the practical

import of the constitutional privilege against self-incrimination. A witness obliged to give self-incriminating evidence by dint of immunity from prosecution has no precise guarantee that charges will not be filed against him on the basis of his testimony. Thus, the protection of citizens built into the Constitution rests on a shaky foundation.

The Fifth Amendment to the Constitution states that a person shall not be "deprived of life, liberty, or property, without due process of law." This concept is one of the most important elements of the U.S. legal system, providing the key to the understanding of American notions of justice. The scope of due process in many respects determines the state of the political-legal regime in the country.

In principle, the notion of due process of law as it is treated in American jurisprudence is roughly equivalent to the concept of legality in the legal systems of other countries. In this sense, the due process clause is the guiding principle of the procedural activities of government law enforcement and justice agencies.

The interpretation of the clause has changed in the course of U.S. history. In fact, the formulation itself was taken from English law, where its existence can be traced back to the 14th century. In borrowing it from later English and colonial statutes and documents and making it a part of the Fifth Amendment procedural guarantees of justice, the Framers of the Bill of Rights apparently sought to express in general outline the idea that any formal "process" resulting in sanctions against an individual entailing restriction of his rights should be conducted "duly", in conformity with rules and conditions established by "law," whether the Constitution, statutes or court rulings. In the last century, the precise meaning of "due" and "law" was not defined by the courts, and the principle itself of "due process of law" was treated as an abstract principle of legality. The eminent American jurist Joseph Storey in his renowned commentary on the American Constitution, published in 1833, devoted no more than a few lines to due process, treating it as an adjunct of the privilege against self-incrimination.

In principle, in American jurisprudence due process of law is understood as a set of guidelines for the administration of justice rooted in fundamental constitutional provisions and principles, Supreme Court decisions, statutes, and also principles of the Anglo-Saxon legal system and notions of fairness stemming from British and American historical and legal heritage and social ethics and morals.

The concept has no clearly defined boundaries, they are left to free interpretation by the courts. As one Supreme

Court ruling said, "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[1]

Yet, due process of law has its own core of minimum procedural guarantees of justice necessary to lend a semblance of stability to the capitalist legal order. In civil cases, for instance, both parties to a suit must have an advance notice of the time and place of the hearing; and in the administrative process, hearings must be held in the presence of the parties to be affected by the decision. In criminal cases, due process mandates that a defendant can be convicted of a crime only if his guilt is proven "beyond reasonable doubt," that the burden of proof lies with the prosecution, and the defendant is presumed innocent until proven guilty and given the chance to enter a plea of guilty or not guilty before the trial.

The following should be said in connection with this last attribute of due process of law.

If the ideal model of due process of law were to be followed, then the accused is presumed innocent until proven guilty in the adversary process where each party has an equal right to present and examine evidence. It is assumed that in a public trial with the participation of jurors, the rights of the accused can be safely protected. However, as a result of a plea bargain, in most of criminal cases in the United States a guilty plea automatically eliminates the need to examine evidence in a trial during which the triumph of the constitutional principles of justice is supposed to be observed, and these principles themselves in effect remain on the sidelines of American justice.

A guilty plea, obviating the need for a trial, blocks an evaluation by the court of whether the evidence was obtained in a lawful way: with a plea copped, the prosecution is discharged from the full burden of proof, and the investigation from seeking sound evidence; in addition, a guilty plea may cloak illegal actions by the police and prosecution during investigation. Presumption of innocence gives way to the belief that nearly every accused is guilty, since the record shows that a majority of them "admit" their guilt, and the establishment of truth in a criminal case cut short by a plea of guilty to a crime that did not take place is virtually impossible. Because of plea bargaining, sentencing, which is the prerogative of the judge, is in effect done before the trial and outside the courtroom by the prosecutor's office. This recalls the absurd logic of the Queen in Lewis Carroll's *Alice's Adventures in Wonderland*. "No, no!" said the Queen. "Sentence first—verdict afterwards."

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[1] Ex parte Wall, 107 U.S. 265, 289 (1983).

The right to enter a plea of guilty guaranteed by the due process clause becomes "the best evidence," and the procedural implications of such a plea undermine the very foundations of due process.

While in the 19th century the due process clause was interpreted as an abstract idea of justice, in the 20th century the clause took on a more concrete meaning.

The clause played a key role in extending the federal Bill of Rights to the states. The Fourteenth Amendment to the Constitution, ratified in 1868, reproduced the language of the due process clause, except that the ban on depriving a person of "life, liberty, or property, without due process of law" was addressed to the states. In the first few decades following the adoption of the Fourteenth Amendment, the Supreme Court refused to clarify the applicability of the due process clause to state institutions, leaving to their discretion the regulation of political and procedural rights of citizens. It was not until 1925 that the Supreme Court used the Fourteenth Amendment to extend the federal guarantee of freedom of speech to the states: in *Gitlow v. New York*, the Court ruled that "liberty," of which by virtue of the Fourteenth Amendment the states cannot deprive any person without due process of law, also includes freedom of speech.

By the early 1940s all the rights and freedoms guaranteed by the First Amendment had been in a similar way extended to the states. But the Court stopped short of incorporating in the Fourteenth Amendment the rest of the rights proclaimed by the Bill of Rights. It was not until the early 1960s, under the liberal helm of Chief Justice Earl Warren, that the Court began the wholesale incorporation in the Fourteenth Amendment of the procedural guarantees of justice and the rights of an individual contained in the Fourth, Fifth, Sixth and Eighth Amendments, thereby extending the guarantees of the federal Bill of Rights to the functioning of state criminal justice agencies. By the early 1970s virtually all of the key provisions of the Bill of Rights had been incorporated in the due process clause of the Fourteenth Amendment. The Supreme Court thereby bound state institutions with all the limitations that until the 1960s were extended only to the federal government.

The due process clause, however, did not guarantee the stability of standards of justice since the outer limits of the due process clause remained nebulous and undefined, the same as the very ingredients of due process of law remained vague: while in the 1960s the Supreme Court gave a broad interpretation of the procedural rights of citizens drawn into the criminal justice system, from the early 1970s these rights began to be steadily eroded in Court interpretations. Virtually every principle established by the Warren Court relative to the rules for conducting arrests, searches and questioning and offering the suspect the assistance of an attorney, that is, almost every constituent part of the due process clause was subject in one degree or another to limitation in the period of the conservative Burger Court. The indistinctness of the doctrinal precepts, the pragmatic approach to the values of constitutionalism in the sphere of justice allow these values to be manipulated to the benefit of the current political interests of the capitalist state. The democratic foundations of the capitalist legal order are thereby undermined.

Despite the elasticity of the due process clause, it is idealized by American jurists, and U.S. propaganda portrays it as a standard of democracy of justice which other legal systems should strive to match. Even those American scholars who understand the historical and political origins of differences in the legal systems often assess "due process" in legal procedures and institutions abroad from a position of blind faith in the American model. Writes the American legal scholar Dr. Christopher Osakwe: "Procedural due process is the heart, the conscience, and the soul of any mature system of criminal justice."[1] Dr. Osakwe judges other legal systems according to the standards of the American system supposed to rest on the principles of due process. Modern constitutional practice in the United States, however, provides no convincing proof of the irreproachability of these principles. A good illustration of this is provided by Harvard University Professor Alan Dershowitz in his book *The Best Defense*. He does not simply theorize, this eminent scholar often acts as a lawyer in sensational cases, and it can be assumed, is well skilled in the ins and outs of the justice system. Dershowitz writes:

"In the process of litigating these cases, writing this book and teaching my classes, I have discerned a series of 'rules' that seem—in practice—to govern the justice game in America today. Most of the participants in the criminal justice system understand them. Although these rules never appear in print, they seem to control the realities of the process. Like all rules, they are necessarily stated in oversimplified terms. But they tell an important part of how the system operates in practice. Here are some of the key rules of the justice game:

"Rule I: Almost all criminal defendants are in fact guilty.

"Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.

"Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in

1 *Tulane Law Review*, New Orleans, Vol. 57, No. 3, February 1983, p. 499.

some cases it is impossible to convict guilty defendants without violating the Constitution.

"Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.

"Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.

"Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.

"Rule VII: All judges are aware of Rule VI.

"Rule VIII: Most trial judges pretend to believe police officers who they know are lying.

"Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the lying police officers.

"Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.

"Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).

"Rule XII: Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.

"Rule XIII: Nobody really wants justice."[1]

A well-intentioned American jurist who believes in the ideals of constitutionalism would surely turn away from the rules discerned by the Harvard professor of criminal law and call them cynical. But couldn't they simply be realistic? The ideal (and idealized) precepts of the due process clause are being eroded by decisions of the present Supreme Court and undermined from within by plea bargaining and restrictions on the privilege against self-incrimination, by the almost customary presumption of guilt, the "general search" of evidence with the aid of electronic surveillance, and are being torn apart in practice by overzealous police and prosecutors. Due process of law, seen through the prism of American reality, seems to be "due" rather from the point of view of the selfish interests of the government, but does not seem to be always "law" from the standpoint of the ideals of constitutionalism.

3. FREEDOM OF EXPRESSION. DOCTRINAL AND JUDICIAL INTERPRETATION

The First Amendment clauses stating that no law shall be made abridging freedom of speech or of the press or the right

[1] Alan M. Dershowitz, *The Best Defense*, Vintage Books, N. Y., 1983, pp. xxi-xxii.

of citizens to peaceably assemble and petition the government are usually considered as a totality in American constitutional theory and are analyzed in close interconnection as an indivisible set of rights which should guarantee citizens freedom of expression.

It should be noted that the provisions of the American Constitution, including the Bill of Rights, were formulated in a language typical of that era—high-flown, nebulous and vague. The political rights and freedoms are set down in the First Amendment in the way that seems to forbid any abridgment of the rights and freedoms mentioned in it, establishing their absolute character. Indeed, the text of the Amendment contains hardly any reservations concerning the execution of its commands with the lone exception of the right to assembly—citizens must assemble "peaceably."

Some American constitutional scholars see the First Amendment as forbidding absolutely any abridgment of political rights and liberties. Supreme Court Justice Hugo Black, known for always carrying a copy of the Constitution in his pocket, stated his position as follows: "/The First/ Amendment provides, in simple words, that 'Congress shall make no law ... abridging freedom of speech or of the press'. I read 'no law abridging' to mean no law abridging."[1]

This idealistic approach to the First Amendment, for all its simple reading, has little support in academia (although many liberals sympathize with it), and naturally evokes a negative reaction from the government. Neither in constitutional theory nor in judicial practice can there be found anything suggesting that the Founding Fathers wanted to establish the "absolute" and unrestricted freedom of expression. Leonard Levy, a constitutional scholar, observes that the Framers of the Bill of Rights "neither said what they meant nor meant what they said" in writing the free speech clause.[2]

The Framers of the American Constitution left the laconic clauses of the First Amendment to be later filled with specific content by constitutional theory and governmental practice.

They no doubt believed that the political liberties had a special social value for individuals and society, but this value in their class outlook was measured by political interest: the democratic guarantees must further the development of bourgeois society.

American theoreticians ascribe to freedom of expression the important function of maintaining and reinforcing the institutions of capitalist society. Those who fought for the independence of the United States believed that "freedom

[1] Gerald T. Dunne, *Hugo Black and the Judicial Revolution*, p. 357.

[2] Cited in Franklyn S. Haiman, *Freedom of Speech*, National Textbook Co., Skokie, Ill., 1976, p. xii.

to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile." Justice Brandeis, who made this statement, held that such discussion was "a political duty," that it was hazardous for the state to "discourage thought, hope and imagination" because "fear breeds repression, ...repression breeds hate, /and/ hate menaces stable government." "The path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[1]

Summing up conclusions of other constitutional scholars, Professor Thomas I. Emerson groups the values sought by society in protecting the right to freedom of expression into four categories. "Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as a means of maintaining the balance between stability and change in the society." The liberal doctrine of constitutional law is prepared to grant freedom of expression the broadest scope possible, allowing almost any views to be professed on the ideas market: "The prevailing current view ... is that freedom of expression should be extended to all groups, even those which seek to destroy it. This position is the only one consistent with the basic affirmative theory and compatible with successful administration of an effective system."[2]

To be sure, liberal theoreticians acknowledge that freedom of speech should be put in proper perspective in relation to other values of capitalist society, such as the maintenance of order, the impermissibility of violence, the maintenance of certain moral standards and the safeguarding of national security, hence the inevitability of conflicts of values and, consequently, the establishment of compromise limits. Yet, by so doing, liberals assert the need for the minimum possible restrictions on freedom, which are acceptable only when free expression incites violence or directly threatens other protected values. Liberals are prepared to accept even certain abuses of freedom of expression rather than to subject it to restrictions. In the words of constitutional historian Thomas M. Cooley, "They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all the proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will

[1] *Cases and Materials on Constitutional Law*, pp. 1044, 1045.

[2] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, Vintage Books, N. Y., 1966, pp. 3, 49.

probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."[1]

The theoretical constructions advanced by the champions of liberal constitutionalism on the basis of subjectively humanistic convictions are rather abstract, removed from the realities of American society and the political practice of the government in the sphere of individual freedom of expression. They resemble more an idealistic vision of society, a recipe for perfecting it on liberal principles than an adequate reflection of the phenomena and tendencies in the politically acute area of state-individual relations and confrontations.

Behind liberal constructions of the institute of political rights and freedoms lies an idea key to a general understanding of American democracy. The First Amendment protects two kinds of interests on free speech. According to Professor Zechariah Chafee Jr., "There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[2]

The wise course is essentially a course of flexible rule by a class of capitalists enabling the state to manipulate freedom of expression and deftly employ it on behalf of reinforcing the capitalist system. Granting citizens freedom to express their opinions on political matters, to scold the President, legislatures and local leaders may create inconveniences for individual politicians but not for the state as a whole. Freedom of speech proclaimed and publicized broadly fosters the illusion of a totally democratic and open society, which serves the ideological purposes of the capitalist state and the long-term practical tasks of ensuring the support of its subjects. "The American state," writes Soviet author S. Belov, "over many years of 'open' development has learned quite well to integrate criticism and denunciation into its system of official propaganda, using them to pour water on their own mill."[3]

Paradoxically, by following Chafee's wise course on political freedoms, allowing freedom of expression and legalizing—within certain limits—dissent, the state fosters the spread of conformism and the establishment of a consensus on bourgeois-democratic beliefs and values. Professor Emerson

[1] *Congressional Quarterly's Guide to the U.S. Supreme Court*, p. 387.

[2] Ibid.

[3] S. Belov, "Inadvertent Revelations," *Novi Mir*, No. 2, 1983, p. 243 (in Russian).

wrote that freedom of speech "results in a release of energy, a lessening of frustration and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic... It asserts that persons who have had full freedom to state their position and to persuade others to adopt it will, when the decision goes against them, be more ready to accept the common judgement. They will recognize that they have been treated fairly, in accordance with rational rules for social living."[1]

The instrumental function of political rights and freedoms in American capitalist democracy is expressed in the state's channeling their exercise into the sphere of purely economic demands, which serves the interests of the ruling class. The United States, being the wealthiest of the capitalist countries, is capable of satisfying a fair share of the economic demands of a rather broad segment of the country's population. The consumer-oriented society itself shapes these demands, which are purely individualistic in nature and are aimed at short-term gain. In circumstances when the country faces economic crises, when society is constantly plagued by unemployment and faith is lost in the future, millions of Americans abandon all else to the goal of achieving some security at least for the present. Possessing a specified number of political rights and freedoms, the citizen uses them to influence the political process primarily to protect himself from current economic adversity and make his own situation, for the present, secure. Playing on the citizens' fears of instability engendered by the very nature of the capitalist economy, the state, capable of satisfying a certain scope of economic demands and itself shaping them, adroitly reduces the exercise of political rights and freedoms to the achievement of short-term economic goals. Freedom of expression is thereby sidetracked from the problem of radically reshaping society to insure social justice for all. Comment political scientists Joshua Cohen and Joel Rogers: "The achievement of short-run material satisfaction often makes it irrational to engage in more radical struggle, since that struggle is by definition directed against those institutions which provide one's current gain... The claim to the status of a system also involves the strong claim that capitalist democracy can take many different people with diverse motivations and effectively bend them to engage in certain shared patterns of consensual behavior with which they will at least partly identify and which they find at least in some measure rewarding."[2]

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[1] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, p. 12.

[2] Joshua Cohen and Joel Rogers, *On Democracy*, Penguin Books, N. Y., 1983, pp. 57, 71.

On the basis of a consensus achieved in this way it is easier for the state to block or simply suppress such forms of political dissent which are not just radical but are actively used to reshape the political order established by the class "wisdom" of capitalists.

Liberal theories interpreting the First Amendment, despite being critical of the restrictions imposed on freedom of speech by the capitalist state, are essentially apologetic of the state since they link the consistent exercise of political rights and freedoms only with capitalist democracy. Thus, the class nature of the liberal doctrine of constitutional law is evident.

It is not surprising that many of the arguments of the liberal trend dominant in constitutional theory are readily adopted by government propaganda and embraced by official ideologists. Ironically, liberal interpretations of freedom of expression and calls for the protection of political rights and freedoms have won endorsement by conservatives and the far right. These constructions offer the opponents of the genuinely democratic values of the American people ideological, political and legal refuge: liberal-neutralist interpretation of political liberties provides full constitutional protection to ultra-right elements in the United States whose goal is to dismantle these freedoms. In the United States, right-wing extremist organizations such as the Ku Klux Klan and the Nazi party enjoy freedom of speech, of the press and of assembly.

Communists and other progressives have repeatedly called for a total ban on the activities of such antidemocratic hate groups. Rod Davis, a left-radical author, writes in *The Progressive*:"Stop the Klan, for it is not the grotesqueries of the Klan mentality which are being opposed but the acceptability of the Klan within its white host. If you feel that the defeat of racism is a greater priority to society than is continued worship of the legal fiction of 'free speech,' then you see the issue clearly. And you will not subscribe to the secondary liberal position that demonstrating against the Klan means 'stooping to the Klan's level.' A society that hates racism would not permit it to flourish and would, in particular, not allow a vanguard racist group to operate with official sanction and police protection. That our society does afford sanction is but a statement that we will employ anything, even the phantom fetish of the First Amendment, to let racism persist."[1]

American liberals view the attempts of honest Americans to raise the issue of outlawing the activities of the Ku Klux Klan, the Nazis and other groups advocating racism and fas-

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[1] *The Progressive*, July 1983, pp. 22, 23.

cism, as totalitarianistic encroachment on the sanctity of constitutionalism. Key to the liberal belief in the inviolability of freedom of expression is the notion of a "free market of ideas," with the most "rational" ideas eventually winning out. But, liberals reason, by blocking access of certain "unpopular" ideas to this market, government authorities will be free to ban any other ideas deemed undesirable. "If any group can be denied the most fundamental of liberties—because if you can't speak and write, you can't change a damned thing—then no group is safe," warns Nat Hentoff in a rebuttal to Davis's article.[1]

Liberals maintain that the greatest threat originates not from right-extremist groups, but from those who want to restrict freedom of expression of the latter, since such restrictions, they allege, coincide with the goals of the right extremists and thus play into their hands. "Once the concept of limiting expression is established," writes Nat Hentoff in another work, "what is to prevent other hate groups from being added to the censored list? And so, each time the state gags another such group, the enemies of free speech will have moved closer to their goal."[2]

Liberal doctrine is implicitly built around the assumption that political rights and freedoms are "classless" and are granted equally and protected broadly by the capitalist state. Liberal theories objectively assist that capitalist state in shaping its own pattern of ideological consensus rooted both in stereotypes of mass petty-bourgeois conscience and in American political traditions. And part of these traditions are racism, indulgence toward the extreme right and intolerance of left-wing radicalism.

Of course, racism, fascism and anti-Semitism advocated by the extreme right have always been loathe to liberals, who have fervently worked to expose them, yet they are prepared to grant such groups full constitutional protection—both in theory and in practice. The American Civil Liberties Union, a leading liberal legal defense organization, for instance, permanently provides Klan and Nazi groups with legal assistance in defense of their constitutional freedom of expression. The ACLU's defense of arrant foes of civil liberties is explained by the formal logic of liberalism's theoretical arguments in the doctrinal interpretation of freedom of expression.

U.S. constitutional doctrine on political liberties is rooted in broad liberal interpretations of the First Amendment, which are in full accord with the long-term ideological and

[1] *The Progressive*, July 1983, p. 24.

[2] Nat Hentoff, *The First Freedom. The Tumultuous History of Free Speech in America*, Dell Publishing Cor., N. Y., 1981, p. 330.

political goals of the American capitalist state, but fail to offer a clue to the real essence of freedom of expression under capitalism.

Practice in the United States witnesses that the contents and limits of political liberties fall short of their constitutional embodiments and their doctrinal interpretation in the spirit of liberal ideals. This deformation can be seen both in legislation and during the judicial performance of constitutional review, and, particularly, in the sphere of extralegal, informal social relations.

Throughout U.S. history the First Amendment has never been officially interpreted as completely ruling out limitations on freedom of expression. Congress as well as state and local authorities have at various times passed legislation and statutes limiting free expression of opinion, the functioning of the media and the right to hold meetings and demonstrations.

In the United States, the judicial branch plays a key role in shaping the legal conditions under which freedom of speech is exercised.

Suits concerning the constitutionality of laws or municipal ordinances which "lawfully" limit free speech, or of actions by authorities infringing on the right of citizens to express their opinion either orally or in written form and to organize political demonstrations, occupy a central place in the activities of courts in general and the Supreme Court in particular. The Court's interpretation of the First Amendment has shaped a code of standards that authoritatively define the formal boundaries of freedom of speech. Many parts of the Constitution "have been time and again explicated in decisions of immense importance," writes the American scholar John A. Garraty. "To try to understand the modern Constitution without a knowledge of these judicial landmarks would be like trying to comprehend Christianity without reading the Bible."[1] Many an American jurist, politician, political scientist and columnist readily point to Supreme Court rulings on the First Amendment when extolling the democracy of the institution of political liberties in the United States. And they will not forget to mention how active and persistent the Supreme Court is in defending the ideals of American constitutionalism embodied in the First Amendment.

Yet the Court has not always been active enough in its defense of political liberties. Moreover, sometimes its efforts have directly jeopardized the democratic ideals and values

[1] *Quarrels That Have Shaped the Constitution*, ed. John A. Garraty, Harper & Row, N. Y., 1975, p. VIII.

of liberal constitutionalism. Called upon to overturn laws limiting freedom of speech, of the press and assembly, the Supreme Court during periods of internal political tensions has on the contrary held such restrictions constitutional and upheld the legality of prosecuting citizens for expressing political views undesirable for the government.

Such was the case during the Red Scare of 1919-1920, when the government responded to the upsurge of labor and left-radical movements with reprisals ranging from the suppression of criticism of the government and the banning of the propaganda of radical ideas to court frame-ups and police harassment of "undesirable" elements. In a number of cases at the peak of the Red Scare, the Supreme Court upheld as constitutional the laws abridging freedom of speech in the interests of national security. During World War II, when Americans of Japanese descent were interned in concentration camps, the Court upheld the presidential executive order and the Congressional act authorizing the internment. And during the McCarthy anti-Communist witchhunt the Court refused flatly to extend the right of free speech to Communists.

It should be noted that American jurists and political scientists, when tracing the evolution of political liberties in the United States, usually do so through the prism of Supreme Court rulings on the First Amendment. Yet the fact is often overlooked that in the first 130 years of its existence, or until the second decade of this century, the Supreme Court had never once ruled on any of the First Amendment clauses dealing with political liberties. Throughout the 19th century legal institutions and the judiciary were involved only minimally in protecting the constitutional freedom of expression. Up until the 1920s federal courts were preoccupied mainly with shaping the legal framework of the capitalist economic system, regulating property relations. Thus, for the greater part of American history, the First Amendment with its absolute ban on abridgments of free speech was left undisturbed by the courts, as if this freedom over these 130 years preserved its inviolability. But this is not so.

From the outset of U.S. history, the expression of politically unorthodox views became the target of repressive restrictions, and the advocates of such views were made the target of harassment and persecution.

And, of course, for a country that made a revolution and gained independence under the banner of freedom, equality and natural rights, legalized slavery, the state under which a human being is deprived of all rights, was a national disgrace. Black slaves were outside the Constitution, and Abolitionists who sought the repeal of slavery were hindered in expressing

their views. In the second quarter of the 19th century laws were adopted in almost every state of the South depriving opponents of slavery freedom of speech and the press. Notes Robert A. Rutland, "both the state officials and local public opinion seemed combined in an effort to squelch dissent. Raising a cry for free speech or a free person, even though most states had a bill of rights, would have been a vain appeal."[1]

The legislative powers of Congress were also put into action to quell opposition to the government. The liberal euphoria ignited by the ratification of the Bill of Rights in 1791 had still not settled when Congress passed the Sedition Act of 1798, which punished, by fine and imprisonment, anyone who uttered, wrote, or published "any false, scandalous and malicious /speech/ against the government of the United States," including the President and Congress. It now became seditious to use speech that would bring the President or Congress "into contempt or disrepute" or might excite against them "the hatred of the good people of the United States," stirring up "sedition within the United States," or rendering assistance to hostile foreign powers.

The Act was passed at a time of chauvinistic anti-French hysteria fanned by the government and acrimonious rivalry between the Federalists, then in power, and the Republicans.

The law threatened all manifestations of opposition; it was clearly aimed at the Republican press, and it offered broad opportunities for criminal prosecution of any criticism of the government. For instance, a town drunk in the city of Newark, on hand when President Adams came through to the accompaniment of a sixteen-gun salute, said, "I do not care if they fired through his ass." He was found guilty of contempt to the President under the Sedition Act.[2]

On the basis of this law the editors of four of the five leading Republican newspapers were punished on charges of criticizing the federal government; in the course of two years 25 arrests were made, 15 indictments brought and 10 sentences passed.

The public, incited by the Republicans, fiercely condemned the Act, which, in force for two years, was, therefore, not prolongated. However, Republican critics of the Act, noting its inconsistence with First Amendment provisions, nevertheless stopped short of condemning the prosecution of people for libel in the press and incitement to riot under the laws existing in the states. And although until 1917 Congress passed no law directed against political dissent, throughout the entire 19th century free speech was subject to limitations

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1 Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, p. 225.
2 Nat Hentoff, *The First Freedom*, p. 83.

in the states, either by legislatures, municipalities or by mob law.

People who for various reasons evoked the displeasure of local authorities or the hostility of the community—for criticizing government policies, displaying too little patriotism, advocating the repeal of slavery or belonging to a religious sect—were targets of legally sanctioned repression and unofficial harassment.

During the Civil War of 1861-1865, the writ of habeas corpus was temporarily suspended by presidential decree, as a result of which people suspected of disloyalty or criticizing the government were arrested without a court warrant and imprisoned for an indefinite term without the filing of charges or the holding of a trial. Newspapers that came out against the policies of the President and the government were closed and editors jailed, and rigid censorship of the mail was imposed to snare antigovernment publications. President Lincoln's harsh measures arose from wartime necessities in the struggle against the rebellion of the southern states, yet critics of the President viewed them as an encroachment on the inviolable principles of American constitutionalism, in particular, the writ of habeas corpus, the requirement of an arrest warrant and the First Amendment guarantee of free speech.

In the period from the end of the Civil War and up to the 1920s (when Congress passed legislation similar to the Sedition Act), the exercise of political liberties for Americans belonging to certain groups or professing certain beliefs was, as in the past, limited or simply impossible, obstructed by state authorities or reactionary elements.

Yet, in the decades after the Civil War, the end of slavery, the rapid expansion of capitalism, the influx of immigrants, the increased exploitation of workers and the sharp aggravation of the contradictions between capital and labor all contributed to the emergence of qualitatively new conflicts around the issue of political liberties.

Slavery was legally abolished in the United States first by a presidential proclamation (Sept. 22, 1862) which granted freedom to slaves in the southern states as of Jan. 1, 1863, and then by the Thirteenth Amendment to the Constitution, ratified Dec. 6, 1865. But even after being freed, the blacks did not receive full rights of citizens.

The Fourteenth Amendment was ratified in mid-1868, stating that all persons subject to the jurisdiction of the United States were citizens of the United States and of the state in which they lived. The Amendment adds: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property,

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment marked an important stage in the evolution of the precepts of American constitutionalism—it prohibited the states from abridging the federally protected constitutional privileges and immunities of its subjects (including the First Amendment guarantees), extended federal standards of legality to the states (no person shall be deprived of life, liberty, or property, without due process of law) and proclaimed all citizens equal (equal protection of the laws).

Racists in the southern states gave the proposed Amendment a hostile reception, succeeding in blocking its ratification for two years. In the meantime, the North mounted a strenuous campaign to win support for the Amendment; it was finally ratified after Congress passed the Reconstruction Plan and installed an occupational regime in the South. In Feb. 1869, Congress passed the Fifteenth Amendment, which forbade the abridgment of the right to vote on account of race, color, or previous condition of servitude. This Amendment was ratified in March 1870.

After the reconstruction of the South had been completed and federal troops withdrawn, the constitutional guarantees lost much of their compulsory force and, for black residents of the region, all of their practical meaning. Blacks had "practically no right of expression at all," observes Nat Hentoff. "They may no longer have been slaves, but they surely were not free American citizens."[1]

Black Americans were barred from taking part in the political process, and either by legal means or by threat of physical punishment were not allowed to vote; the racists resorted to the lynch law, and racist terrorist organizations emerged across the country, among which the Ku Klux Klan became prominent.

Soon the Supreme Court issued decisions that paralyzed attempts by Congress to enact laws to protect the rights of former black slaves. For example, in 1883 the Supreme Court ruled unconstitutional the Civil Rights Act of 1875 which barred discrimination on the basis of race and color in hotels and public parks and places of recreation. The Court held that the Act did not satisfy the requirements of the Fourteenth Amendment since the Amendment called for "equal protection of the laws" on the part of state authorities, but did not ban discrimination on the part of private persons.

In 1896 the Supreme Court dealt a new blow to the idea of genuine equality for black Americans. In *Plessy v. Ferguson*,

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[1] Nat Hentoff, *The First Freedom*, p. 98.

the Court upheld, on the basis of the Fourteenth Amendment, a state law prescribing the furnishing of "separate but equal" facilities for rail transportation and requiring the separation of white and black passengers. The system of segregation endured until 1954, when in *Brown v. Board of Education* the Supreme Court formally abandoned its segregationist interpretation of the equal protection clause. This decision took almost 60 years to make.

In the 19th century, the Supreme Court, the ultimate guardian of the principles of constitutionalism, played a historically reactionary role in its treatment of the blacks. Upholding the "separate but equal" principle and handing state authorities vast powers to limit the participation of black Americans in the political process, the Court created a legal foundation on which southern blacks were effectively denied their fundamental human rights. Blatantly racist state laws, discriminatory voting procedures, economic oppression and lynch law denied blacks any freedom of expression and turned them into second-grade citizens.

Another area in which freedom of expression was abridged despite constitutional guarantees was in relations between workers and business. The rapid industrialization in the second half of the 19th century brought with it growing exploitation of workers by their employers, which contributed to a rise in the labor movement and protest action and the spread of socialist ideas. The constitutional rights of working-class Americans were flagrantly violated by factory-owners and by authorities, strikes and demonstrations were brutally suppressed by the police and troops and the labor movement was infiltrated with spies, stooges and private detectives.

In quelling labor protest, the government and business, alarmed by the size and vigor of the actions, were moved by practical considerations of the day and set aside the abstract ideals of constitutionalism. "To hell with the Constitution. We aren't going by the Constitution," an officer breaking up a demonstration early this century said.[1]

Unorthodox views, particularly radical socialist ideas, were subject to brutal repression. The WASP—white Anglo-Saxon Protestant—mentality predominant among the American bourgeoisie and political elite at the turn of the century connected amorality and anarchism with the influx of immigrants, to whom, it was asserted, American political institutions and cultural values were alien. The American bourgeois attributed the growing restlessness of the working class to the subversive influence of "anarchists" from among "aliens," the new wave of immigration.

[1] Nat Hentoff, *The First Freedom*, p. 103.

In 1902 the state of New York passed a Criminal Anarchy Act that curbed criticism of the existing system. This law proclaimed to be criminal dissemination of ideas advocating the overthrow of the government or membership in organizations spreading such ideas. By 1920 "criminal anarchy" or "criminal syndicalism" laws had been passed by 35 state legislatures. The dissemination of ideas undesirable for the government made one a criminal.

Naked xenophobia and fear of infiltration of socialist ideas in the country led to the passage in 1903 of the Federal Immigration Act barring entry into the United States of "anarchists" and other persons supporting the idea of the overthrow of the American Government by force. The law centered on a person's beliefs, not activities. From the beginning of the century the "free market of ideas" began to be steadily fenced in by restrictions on immigration.

The New York Criminal Anarchy Act, a modification of the 1798 Sedition Act, was the first law passed in the country in the 20th century designed to legalize attempts to drive left-wing "seditionists" from the "free market of ideas" by means of criminal sanctions.

The passage of these two laws brought about a shift in lawmaking policies that allowed suppression of left-wing views seen as alien to Americanism and imported by hostile foreign forces.

Early in the century, the Industrial Workers of the World (I.W.W.), a labor organization founded in 1905 to unionize mostly unskilled workers, was singled out by the reactionaries as a special target of suppression. The I.W.W. was headed by such prominent labor leaders as Big Bill Haywood and Eugene Debs. The most active labor union of the era, the I.W.W., openly called for the restructuring of society on socialist principles. It drew its membership mostly from recent immigrants from Eastern and Southern Europe, Asia, Latin America, black Americans and women. The radicalism and foreign origins of the Wobblies, as they were known, made them the target of particularly harsh harassment on behalf of the authorities and industrialists, who incited against them the chauvinism and racism of "100 percent Americans."

In spite of the radical goals and militant spirit of the I.W.W., its members did not adhere to the use of violence. Instead, to disseminate their ideas and recruit new members, the Wobblies held meetings, organized demonstrations and made soapbox speeches.

The Wobblies upheld their belief in free speech at the price of their personal freedom and safety—in many cities they were terrorized, thrown into jail, brutally assaulted and in some cases tortured. Local residents from vigilante committees—with the tacit approval of authorities—helped the police

disperse the Wobblies. Armed mobs of "respectable" citizens organized and incited by industrialists broke up Wobbly meetings, drove them out of the city, brutalized and murdered them; in some cases, initiating "aliens" to "Americanism," they forced them to kiss the American flag, under the threat of death.

The unconstitutional actions of local authorities were augmented by those of the federal government. In Sept. 1917, the Department of Justice authorized the raiding of I.W.W. offices across the country and the confiscation of the organization's publications. The materials confiscated were used as evidence against the I.W.W. in frame-up charges of "inciting riots," "espionage," etc. By the end of 1917 almost the entire I.W.W. leadership was in jail, and the organization eventually disbanded. Over the entire persecution campaign against the I.W.W., the government never once proved that any of the Wobblies had committed an act of violence. Their sole crime lay in their assertion of radical political views. The Wobblies occupy one of the most vivid pages in the history of the American labor movement's drive to defend democracy and political liberties.

The entry of the United States in World War I touched off a wave of chauvinism, jingoism and xenophobia among the bourgeois strata. And although lawyers, as custodians of American legalism, described the war as "a crusade to defend the sanctity of liberty under law" and "a battle for law" with "divine right" and "individual liberty" as protagonists,[1] chauvinistic sentiment spilled over into new oppressive legislation and widespread violence against "alien" radicals. Federal laws were enacted that restricted freedom of speech in the interests of protecting national security. Among them were the Espionage Act of 1917, which made it a crime to call for insubordination in the armed forces or draft resistance, and the Sedition Act of 1918, which prescribed legal sanctions for antigovernment pronouncements. State legislatures passed similar bills targeted against radicals, war resisters, pacifists and others holding "disloyal" opinions. Also, in 32 of the states, laws were issued that barred displays of the red flag, usually punishable by up to 6 months in jail. The authorities displayed firmness in rooting out political dissent at the expense of violation of individual liberties. A North Dakota judge confessed at the annual dinner of the American Bar Association that when he read about war critics he felt "that there are men in this country that I would like to hang."[2] More than a hundred years before this, Thomas Jefferson had said in his First Inaugural Address: "If there be any

[1] Jerold S. Auerbach, *Unequal Justice*, p. 103.
[2] Cited in ibid., p. 104.

among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[1]

In the chauvinistic passion of the war and the years that followed, the tolerance of political dissidents professed by Jefferson could itself be taken for treason; the government no longer responded to "errors of opinion" with "reason," but with oppressive laws that were enforced, in the words of the American scholar Carl B. Swisher, "with a high degree of ruthlessness."[2] Punishment of workers, radicals and conscientious objectors to the war was meted out not only by means of unconstitutional laws and trials, but through physical attacks by the police and vigilante mobs. Jingoist groups terrorized draft resisters, raided labor organizations opposed to the war and persecuted immigrants, pacifists and persons suspected of being pro-German.

When the Great October Revolution swept Russia, American reactionaries adopted oppressive measures against Bolshevik sympathizers, socialists, workers and progressive leaders who urged solidarity with Soviet Russia. A wave of Red Scare gripped the country. A cloud of universal suspicion descended, and intolerance became one of American's "virtues."

Glaringly unconstitutional, lawless and most abhorrent from the point of view of justice and humanism was the federally sponsored campaign known as the "Palmer Raids," named after the man who organized it, Attorney General of the United States A. Mitchell Palmer. An erstwhile judge, he saw nothing shameful from the standpoint of the Constitution in suppressing views conflicting with the official ideology. In his opinion, "the chief evil of the Red movement, both here and abroad, consists in the fact that it accomplishes a constant spread of a disease of evil thinking."[3]

It was for Palmer to decide, of course, whether the thinking was "evil." The best cure for such thinking were vigorous oppressive measures. On orders from Palmer, on Jan. 2, 1920, agents of the Justice Department and local police units raided offices of left organizations and houses of suspected radicals in 33 cities throughout the country in which more than 4,000 persons were arrested. Palmer ordered the confiscation during the raids of all materials—books, magazines, diaries, membership cards and letters—that could be used to prove "evil thinking." Four days later the Justice Department repeated the raids, which this time involved the arrest of 6,000. The

[1] Cited in Franklyn S. Haiman, *Freedom of Speech*, p. 1.
[2] Cited in Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, p. 227.
[3] Nat Hentoff, *The First Freedom*, p. 112.

Palmer Raids were a blow not only to the First Amendment (since their goal was to arrest, try, and deport radicals), but also to other amendments that proclaimed the inviolability of person and due process of law. The arrests, searches and seizures were conducted without warrants; no charges were presented to those arrested, who were denied visits by lawyers or relatives and were interned in inhuman conditions, often in chains. Many of the victims of the raids had no relation whatever to left organizations and were entirely ignorant of politics.

Prominent labor organizers were prosecuted under the Espionage Act and state criminal anarchy laws, including Eugene Debs, Charles Schenck, Benjamin Gitlow, Charles Ruthenberg and Bill Haywood. The Industrial Workers of the World could not withstand repressive blows. That same year, in 1920, Nicola Sacco and Bartolomeo Vanzetti, two labor activists, were arrested on fabricated charges. They were sentenced to death a year later and executed in 1927.

The ideals of American constitutionalism were pushed aside in favor of the government's current political considerations. It was at this time that the Supreme Court began to be flooded with appeals from the convicted raising the issue of constitutionality of the repressive legislation. On the basis of these cases the Court began to formulate certain basic standards as to the interpretation of the First Amendment by which lower courts were to be guided in ruling on the constitutionality of laws governing freedom of speech and the legality of conviction under these laws. Gradually the Court shaped a set of rules that came to be known as the "jurisprudence of the First Amendment."

The Supreme Court first broke new ground in this area in cases heard in the late 1910s and 1920s involving leaders of left-radical and labor organizations. Later, too, the most pointed issues regarding the interpretation of constitutionally guaranteed freedom of expression arose in connection with the prosecution of political misfits. With time, however, the jurisprudence of the First Amendment, born of political repressions, began to assimilate rulings on cases in which the defendant was not involved in political activities and had no clearly defined political views, but simply insisted on his right to hold certain beliefs and convictions and make them known to those around him in one form or other.

Many forms of individual self-expression unconnected with political opposition to the existing system in the United States can nevertheless come into conflict with the notion of "decorum" or have the ability of causing unlawful actions. These forms of expression are regulated by the legislature

out of concern for the maintenance of public order, moral standards and principles of civic behavior. However, as the record indicates, laws enacted to combat a certain perceived danger have the property of being employed against other dangers. The conditions which open the way for arbitrariness in the expression of non-political ideas do the same in the area of political conflicts between the individual and the state. It is for this reason that all cases involving the enforcement of laws that in one way or another regulate the forms of individual self-expression are reviewed by the Supreme Court at the highest constitutional level.

In the cases in which the issue is raised of the unconstitutionality of such laws on the grounds that the means of regulation prescribed by them limit freedom of speech, the Supreme Court arrived at various standards, rules and principles for determining the boundaries of the areas protected by the First Amendment.

Yet, no single common approach has been developed to determine the limits of the permissible in the assertion of political liberties, and the pronouncements of the Supreme Court in this area form a rather motley conglomerate of rather questionable and not always consistent standards. This is hardly surprising in view of the fact that the standards, rules and principles evolved under the influence of the overall political processes in the country, displaying the inherent ambivalence of American constitutionalism; their movement toward a liberal reading of the Constitution reflected a determined struggle (including in the courts) by the American people to preserve genuinely democratic ideals.

American constitutional theory assumes that "pure speech" should not in principle be limited by the government. However, the Supreme Court record shows that it has never steered a straight course as to the absolute protection of even purely verbal forms of individual expression. Certain forms of direct self-expression were legislatively banned and were made punishable under criminal or civil law, and the Supreme Court upheld the constitutionality of such bans. Among the forms outlawed are incitement to commit a serious crime and incitement to violate public order, distribution of pornography, the dissemination of knowingly slanderous or libelous information about government officials and private individuals, the reproduction of so-called "fighting words," calls for subversive activities against the state and change of the existing form of government.

The fully warranted statutes on incitement to violence are often used to break up actions regarded as politically undesirable. In 1968, for instance, Congress amended the Civil Rights

Act of 1968 to make it a crime to cross state borders for the purpose of inciting riot (Rap Brown Amendment). The Amendment was passed at the peak of antiwar and youth movement and was quickly put to use against the Chicago Seven, who were accused of inciting violence in Chicago during the Democratic Party Convention. The federal court of appeals that heard the case saw nothing in the law that violated the constitutional guarantee of free expression, and the Supreme Court refused altogether to hear the case.

In principle, the guarantees of the First Amendment do not extend to the manufacture and distribution of pornographic materials. In *Roth v. United States*, heard in 1957, the Supreme Court ruled that obscenity standards do not apply to the constitutionally protected freedom of speech and of the press. Yet pornography is not excluded entirely from among the items protected by the Constitution since modern jurisprudence in the United States, which ostensibly reflects the moral and ethical values of the American way of life, considers the distribution of pornography a form of realizing one's right to free speech in the context of the First Amendment. In the 1960s and 1970s the courts were logjammed with cases brought by dealers and producers of pornography arguing that the First Amendment freedoms of speech and the press protected their activities. In the 1973 case of *Miller v. California*, the Court approved a restricted definition of "obscenity" and issued new standards outlawing hard-core pornography thus supposedly protecting the "ideals" of the First Amendment. However, by issuing new standards, what the Court actually did was to protect the profits of pornography distributors rather than stop the flow of indecent publication. The Court simultaneously broadened the discretionary powers of judges and prosecutors regarding pornography cases, allowing them to go by "community standards" of obscenity.

It should be noted that the granting of broad discretionary powers to the prosecution always carries the risk of doing injury to the ideals of justice, constitutional rights and individual liberties. Besides, the government might apply the same principles resorted to in obscenity cases to other politically pointed areas.

For this reason many jurists in the United States, for all their personal dislike of the pornography business, see it as a lesser evil in comparison with the potential risk to freedom of speech and the press presented by granting the prosecution broader discretionary powers.

The police and prosecutors are egged on by ideological and religious traditionalists, the self-proclaimed custodians of the nation's moral health who, as the local newspaper *Hawk Eye* puts it, "are notably inactive toward the real obscenities of racial discrimination, economic exploitation, social neglect, and private and public corruption; but who rush to make their prejudices into law at the first sign of individual tastes different from their own."[1]

By making it possible to prosecute a person for violating the obscenity standards of a particular community, the Supreme Court created a situation under which a person responsible for issuing a large edition of erotic publication considered within the bounds of decency locally, may be prosecuted for that same publication in another community where it is judged obscene.

This is exactly what happened, for example, in respect to a widely distributed pornographic movie made in New York.

In 1974 the creators of the movie were indicted by a Grand Jury and United States Attorney in Memphis for being part of a "nationwide conspiracy" to create an obscene movie and distribute it "throughout the United States." And although the Sixth Amendment to the U.S. Constitution states that a defendant can be prosecuted only in the state and district where the crime was committed, it followed from the Memphis ruling that a crime took place in each and every district where the movie could have been shown.

In commenting on this case, which vividly illustrates the extent of discretionary powers granted to prosecutors under the new rules, Harvard Law Professor Dershowitz is concerned with the potential danger these new rules pose to other politically important interests of citizens: "Under the theory of this indictment, any local United States Attorney could decide the most appropriate district in which to prosecute. This raised the specter of the federal government's dragging black militant publishers from Harlem to Mississippi, and labor organizers from Michigan down to North Carolina, in order to have them tried before maximally hostile jurors."[2]

Pornography, no matter what sporadic attempts are undertaken by the capitalist state to combat it, has become firmly etched in the political fabric of the United States and is sheltered from excessive regulation because it is the source of million-dollar profits. The methods resorted to by the police and the courts to effectively combat vice augment the arsenal of means employed by reaction to countermand genuine free thinking.

A significant part of the debate in the Supreme Court on the proper interpretation of freedom of expression centered on whether it should apply to so-called "fighting words." Interpreting the First Amendment broadly, the Supreme Court held constitutional the expression of words that, al-

[1] Cited in Nat Hentoff, *The First Freedom*, p. 312.
[2] A.M. Dershowitz, *The Best Defense*, p. 159.

though indecent or offensive to government authority, contain no perceptible threat to the interests of the state. The precedent on this issue was established in *Cohen v. California*, heard by the Supreme Court in 1971. Paul Cohen, a youth activist who urged resistance to the draft during the U.S. aggression in Vietnam, was arrested in a Los Angeles court building for wearing a jacket on which was written an abusive message regarding the military draft. Cohen was convicted on charges of violating a California breach of the peace law that makes "offensive conduct" a crime. Yet, Cohen's behavior in the court premises, where he came on some business of his own, was fully within the limits of decency, and the words on his jacket, despite being indecent, could in no way provoke the action it urged. In reviewing the appeal of Cohen, who had been sentenced to 30 days in jail, the Supreme Court established the principle that state authorities could not prosecute a person for publicly reproducing "offensive language" if such language expressed a legitimate political protest and did not incite the violation of public order.

While official penalties for individual verbal abuse of the system gradually became milder, punishment of deliberate "political dissent" dangerous for the government has remained harsh throughout American history and took on various forms. Oral or written speech even in its "pure" form, if it expresses a person's *conviction* of the necessity of revolutionary change of capitalist society or organized resistance to government policies, was branded "subversive" and "un-American" and thus punishable by law.

The first federal law enacted to limit freedom of speech for the pursuance of political objectives was the Sedition Act of 1798. Over 100 years later, two similar laws, the Espionage Act of 1917 and the Sedition Act of 1918, were passed. By the 1920s, many states had on the books laws resembling in effect the New York criminal anarchy law and the California criminal syndicalism statute, which made criminal the incitement to revolutionary action and change of the system of government.

In 1940 the Alien Registration Act was passed, popularly known as the Smith Act for its Congressional sponsor, Rep. Howard Smith. The law required all foreign citizens residing in the United States to register with a government agency and authorized the deportation of anyone suspected of having ties with a "subversive" organization. As Professor Zechariah Chafee points out, the Smith Act was "no more limited to the registration of aliens, than the Espionage Act of 1917 was limited to spying."[1]

[1] Cited in N. Hentoff, *The First Freedom*, p. 137.

The Smith Act prescribed severe punishment—up to ten years' imprisonment—for advocating or distributing printed materials calling for violent overthrow or destruction of any government in the United States (from a village to the federal government). The law thus directly limited the free speech of those citizens who advocated the need for revolutionary change. The law also limited the freedom of assembly and of political association, as it forbade upon threat of criminal prosecution the formation of societies or groups or the organization of meetings for the purpose of disseminating seditious ideas. The law was thus directed not at actions that posed a real threat to the American form of government but at "pure speech" deemed threatening the capitalist system.

In the late 1940s and early 1950s, at the height of the Cold War and unconstitutional witchhunts, the Alien Registration Act was enforced against members of the U.S. Communist Party. Under its provisions, 141 people were indicted, 29 of them were convicted and served time in jail. The prosecution did not present specific evidence of criminal activity against the defendants—nor could it, as the Communists were convicted for their beliefs.

In spite of the Smith Act being in clear violation of First Amendment guarantees forbidding the making of any law abridging free speech, it was never declared unconstitutional by the Supreme Court and it is still on the books (2385, Title 18, U.S. Code).

The legal arsenal of reaction in its campaign against Communists and other advocates of progressive ideas was augmented during the McCarthy scare of the early 1950s. In 1950, Congress approved the McCarran Internal Security Act, which effectively banned the Communist Party, stripped persons adhering to Communist ideas of their constitutional rights and established a truly inquisitorial machinery for persecuting Communists. The Communist Control Act of 1954 barred the Communist Party from participation in elections and from enjoying other rights of a political organization. Both laws, which were overtly aimed at the suppression of Communist ideas, denied the Communist Party and other progressive organizations, lumped together arbitrarily by the authorities under the category of "subversive," their constitutionally guaranteed right to association.

On the whole, all the laws cited, beginning with the Espionage Act of 1917, limited the right to criticize the American system and prescribed punishment for free speech when the latter was used to propagate ideas for a change of the form of government established by the Constitution, the overthrow of the capitalist system or calling for organized resistance to official policies. Karl Marx harshly condemned these types of laws, writing: "Laws which make their main criterion not *ac-*

tions as such, but the *frame of mind* of the doer, are nothing but *positive sanctions* for lawlessness."[1]

The Supreme Court formulated a number of criteria for determining the limits beyond which the expression of political views and criticism of the government are no longer constitutionally protected and can be punished by law as actions intended to undermine public order or national security.

The first time the Supreme Court offered a standard for permissible limitations on free speech was in the 1919 case of *Schenck v. United States*. Charles Schenck, the Socialist Party General Secretary, and a number of other people who had exposed the imperialist nature of World War I, were convicted under the Espionage Act of 1917 for printing and distributing antiwar leaflets calling on citizens to resist the military draft. Schenck appealed his case to the Supreme Court on the grounds that his activities were protected by the First Amendment.

The Supreme Court, however, upheld the conviction, arguing that "the United States constitutionally may punish speech that produces or is intended to produce a clear and present danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[2] The Court contended that because the United States was at war with Germany, Schenck's agitation against the draft was a "clear and present danger" to the government.

Thus the "clear and present danger" test was incorporated in the interpretation of the First Amendment. It implied the possibility of criminal prosecution of people who, either orally or in print, express ideas that, as Supreme Court Justice Louis Brandeis elucidated in the 1927 case *Whitney v. California*, may directly produce immediate action posing a serious danger to the state.

Against the backdrop of increasingly harsh treatment of political dissent and a crackdown on labor and left radicals, the clear and present danger rule in many respects was a step forward in American criminal law theory; compared to some of the principles that established penalties for criticism of the government and its policies, the clear and present danger rule set down clearer standards of guilt, more precisely defined the grounds for criminal liability and, in a certain sense, limited the discretionary powers of the prosecutors and the courts in criminal prosecution of the political opposition (although in respect to the defendants in the

[1] Karl Marx, "Comments on the Latest Prussian Censorship Instruction", Karl Marx, Frederick Engels, *Collected Works*, Vol. 1, 1975, pp. 119-20.

[2] 249 U.S. 47, 52 (1919).

Schenck case they were applied arbitrarily to suit the government's current political interests).

Already then, in 1919, and later on, the Supreme Court refused to apply the clear and present danger test to antigovernment agitation and propaganda, turning instead to the broader test of "evil intent" of speech. This criterion eliminates the necessity of finding a *direct* causal link between speech and the real danger that this speech will bring about *forthwith* certain evils and allows for punishment of people whose publicly uttered views even in the most abstract way are aimed at undermining the government or causing resistance to governmental policies. Guided by this criterion, the Supreme Court upheld the conviction under the Espionage Act of Eugene Debs for advocating socialist ideas and opposing the war, of J. Abrams and his associates for distributing leaflets calling for a halt to the intervention in Soviet Russia, and of others whom the government accused of intent to undermine the military efforts of the United States. The Supreme Court took avail of the vagueness of the bad tendency test to uphold the sentences of persons convicted under state criminal anarchy laws (the laws themselves were ruled quite constitutional); B. Gitlow was convicted for advocating the revolutionary overthrow of the capitalist system, and A. Whitney for taking part in activities organized by Communists.

In later cases, the clear and present danger test was applied rather inconsistently. The vagueness and ambiguity of its interpretations as to specific cases were twisted by judges and prosecutors and used as formal grounds for the prosecution of dissenters while the real cause was the evil intent test.

In 1951, in the midst of the anti-Communist scare, the Supreme Court in the case *Dennis v. United States*, upheld the convictions of a group of leaders of the Communist Party of the United States who were sentenced under the Smith Act for taking part in activities that allegedly produced a "clear and present danger" of an attempted overthrow of the government. The Court's ruling, influenced by the climate of the Cold War, signalled the start of a sweeping campaign by the government to prosecute Communists for their convictions.

In its ruling, however, the Supreme Court offered new conditions under which the clear and present danger test could be applied: in each case the trial courts "must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[1]

[1] 341 U.S. 494, 510 (1951).

This provided for a more considerate and reasonable application of the clear and present danger test to cases of political dissent. Finally, in a landmark decision in the 1957 case *Yates v. United States*, the Supreme Court abandoned the application of the clear and present danger test to antigovernment propaganda not linked with subversive activities. In this case, the Court overturned the convictions of members of the Communist Party sentenced under the Smith Act, discerning no "clear and present danger" to the American government in their activities, and established an important precedent under which to obtain a conviction under the Smith Act, it must be shown not just that the person advocated the abstract idea of changing the existing government system, but that this advocacy was directly associated with specific acts in practice. The Supreme Court thus made it considerably more difficult to convict political dissenters under the Smith Act. A number of factors were responsible for the Court's shift on the issue of prosecuting Communists, including growing opposition to McCarthy's witchhunts, the persistent fight waged by Communists for their rights, a liberal shift in the Court's composition: new appointees to the Court were adherents to constitutional ideals regarding political liberties.

From the Yates case on, the Supreme Court began gradually to replace the clear and present danger with the "incitement" test, according to which the courts should not proscribe "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[1]

Over the last 20 years, in cases in which the constitutionality of state laws has been questioned on the grounds that they violate the First Amendment, the Supreme Court has applied tests which give more weight to the way speech is regulated rather than speech contents. The three criteria most often applied are vagueness, facial overbreadth and the possibility to use the least restrictive means. This means that the Supreme Court can rule a state law (which in one degree or another limits free speech) unconstitutional in view of its "vagueness" if it is difficult to determine exactly which kinds of speech the law forbids. Similarly, the law may be reversed if by virtue of its "facial overbreadth" it limits simultaneously both constitutionally "protected" and "unprotected" forms of expression. If the law's wording is entirely clear, then for achieving the objectives of the law (such as maintaining public order) the law-maker in regulating freedom of speech must resort to the "least restrictive means."

[1] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

Applying these three criteria, the Supreme Court reversed an entire series of state legislation (statutes and municipal ordinances) even without examining the grounds on which various people were convicted. Instances of the prosecution of Communists and left radicals on the basis of reactionary laws fell dramatically thanks to the Warren Court's liberal position on matters of free speech.

The Smith Act is difficult to apply because of the rigid requirement of proving that a link exists between the advocacy of revolution and actions to that end, established by the Court in the 1957 Yates case and in subsequent cases. By the 1970s, the Supreme Court had effectively rendered unenforceable state laws on criminal anarchy and criminal syndicalism, calling into question their constitutionality. Viewed through the prism of the liberal decisions of the Warren Court, freedom of speech in the United States appears to be effectively shielded from possible encroachments on the part of the government. Yet it is not these rulings alone that shape the boundaries of free speech; the realities of political practice also have their say. This will be the next subject of our discussion.

A principle has been worked out in American judicial practice, known as the "speech plus..." principle, under which free speech loses its relatively broad constitutional immunity if it is combined with action. Speech, however constitutionally protected, combined with action can be regulated by law, restricted, or simply banned on account of various reasons of public import, such as the maintenance of public order, ensuring the execution of laws and the effective implementation of official policies. The "speech plus..." principle comes into operation at the place where the institutionalized interests of the government and the demand of the individual for self-expression come most into conflict. In this border zone between constitutionally protected pure speech and hypothetically unlawful action the government is in the best position to legally suppress dissent (manifested outwardly in various types of conduct) under the pretext of preventing or punishing not the beliefs themselves but the unlawful types of conduct proclaimed by them. To be sure, in many instances certain conduct is the only means by which a person can express his views, a political protest in particular.

The main form of "speech plus..." is meetings, rallies, demonstrations and speeches, all of which are protected by the First Amendment guarantee of the right of the people "peaceably to assemble and to petition the Government for a redress of grievances."

The right of citizens to attend meetings and demonstrations

for the purpose of expressing their political views flows from the First Amendment protection of free speech and the right to "peaceably assemble." Yet, because demonstrations involve actions that may violate public order, they are more tightly restricted than "pure speech" or peaceful assembly. In *Cox v. New Hampshire*, heard in 1941, the Supreme Court strengthened the principle under which law-makers, to maintain public order, may regulate the time, place and form of conducting demonstrations in public. Demonstrations may be held if they are peaceable, orderly and given special permission by local authorities. However, laws regulating the holding of demonstrations must contain precise language and may be applied "without unfair discrimination."

In practice, the precedent established by the Supreme Court on this matter created a legal foundation, politically convenient for the government, for statutory devices allowing, when needed, to forbid or restrict free expression through meetings and demonstrations.

American jurisprudence considers "symbolic speech" to be a form of "speech plus...". "Symbolic speech" refers to the expression of an opinion or political protest in public through silent symbolic conduct not resulting in action that could directly lead to a violation of public order.

The limits of "symbolic speech" came to be the object of most intense debate in the 1960s, when demonstrations against the government's domestic and foreign policies became very widespread and free speech took on highly diverse, sometimes deliberately exotic forms. In the overwhelming majority of cases "symbolic speech" protests were of an intentionally non-violent nature.

The Supreme Court was faced by a tough dilemma in deciding under what circumstances symbolic expression of opinion should be allowed and under what circumstances it should be punishable. Having direct bearing on the Court's decision was the fact that many antiwar activists were burning their draft cards as a way of expressing their protest against the U.S. aggression in Vietnam. From a legal standpoint, such form of symbolic action contained two offenses: first, resisting the draft, and second, intentional destruction of government property. The Supreme Court had to decide whether the First Amendment protected the burning of draft cards as a form of symbolic speech.

Many antiwar activists and members of the civil rights movement who burned the American flag as a symbol of protest were convicted on charges of "flag desecration." Several cases went before the Supreme Court in which the defendant was charged with burning the flag, attaching antiwar symbols to it or making it into an antiwar emblem. In Massachusetts, a teenager was convicted for wearing an American flag on

the seat of his blue jeans. And in New York, the owner of an exhibition hall was sentenced to jail for displaying the phallic symbol draped in an American flag in a display window alongside sculptures with antiwar messages.

The Court was painfully divided over flag desecration cases, as on the one hand, such cases represented clear disrespect for the flag, and on the other, the liberal justices of the Court were aware that such actions were being taken to protest against government policies committed under the flag. Such actions involving the flag were not isolated cases—militant students, civil rights, antiwar and other activists resorted to other forms of non-violent protest as well. All of them in principle should have been protected under the First Amendment guarantees of free speech.

Like in many other categories of cases, the Supreme Court did not develop a uniform approach for judging the constitutionality of such protests.

The Supreme Court refused to recognize as a form of symbolic speech protected by the Constitution sit-in demonstrations by blacks in segregated cafeterias and the burning of draft cards. In *United States v. O'Brien*, a 1968 draft card burning case, the Court ruled that the national interests in maintaining an effective military draft system warranted "the incidental restriction on alleged First Amendment freedoms."[1] But in 1969, the Court held in *Tinker v. Des Moines Comm. School Dist.* that the decision of school authorities to temporarily expel students for wearing black armbands as a war protest symbol violated the First Amendment.

At first, the Supreme Court refused to see as constitutionally protected action the desecration of the flag, and declared invalid (by virtue of their facial overbreadth and vagueness) the provisions of the laws on the basis of which the convictions were made. However, in the 1974 Spence case (Spence was convicted on a Washington state law on charges that in protest of the U.S. bombing of Cambodia and the shooting of students at Kent State University, he displayed an American flag out of his window to which he had affixed an antiwar symbol), the Court ruled that the action in question represented constitutionally protected "symbolic speech" by which Spence expressed his anguish "about the then current domestic and foreign affairs of his government."[2]

Following the Spence case the Supreme Court apparently decided that the review of flag desecration cases in the context of the First Amendment, particularly with the flag burning as a symbol of political protest, was too delicate

[1] 391 U.S. 367, 376 (1968).
[2] Spence v. Washington, 418 U.S. 405, 411 (1974).

an undertaking from the point of view of conflict of values. Therefore, when in the 1974-1975 period the Court was asked to consider appeals of state supreme court decisions upholding the conviction of persons on charges that they burned the flag in protest of the U.S. aggression in Vietnam, it simply refused to hear these cases, citing the absence of a "substantial federal question."

The First Amendment freedom of the press is regarded in American jurisprudence as a means of ensuring freedom of expression in the press, television and radio. In forbidding the abridgement of freedom of the press, the authors of the Bill of Rights wanted to prevent the inception in the young republic of a system of state censorship the kind that had existed in England. (A censorship law had been passed there in 1662 that required the licensing of printing presses and the prior approval by the church and the crown of all printed materials; in 1695 Parliament refused to extend the life of this law which provided the crown with broad opportunities for abuse and the ability to stop hostile publications.) The idea of censorship embodied in the licensing of printing presses was repugnant to the Enlightenment philosophy of the Founding Fathers, even if for the simple reason that the press was one of their chief weapons in their fight for independence from Britain.

Like other political liberties, freedom of the press is not absolute—the standards and criteria of constitutionality discussed above apply to it as well. Yet, there exist certain legal principles that apply to freedom of the press alone.

In the United States the government can exercise pre-publication censorship—referred to as "prior restraint"—asking a court to issue an injunction halting the appearance of a specific publication; post-publication (punitive) censorship is exercised also through a court by bringing a civil suit or filing criminal charges. A convenient way for the government to exercise censorship is by filing charges against the author of a piece for publishing knowingly slanderous or libelous facts about government officials. Prosecution for libel has a long tradition dating back to English common law and is often used as a way to punish overly free expression of opinion in the media. Until the 1960s no judicial standards had existed that more or less precisely defined the grounds for libel prosecutions. This issue was addressed by state legislation in such a way that virtually any inaccuracy in regard to public officials could serve as grounds for prosecuting the author or publisher.

The question of what constituted libel thus overshadowed the constitutional ideals of free expression and lessened

the public significance attached to freedom of the press by liberal theory. The Supreme Court under Earl Warren attempted to correct this imbalance. In *New York Times Co. v. Sullivan*, argued in 1964, the Court issued a landmark ruling on the enforcement of libel statutes.

In an attempt to balance the constitutional ideals of freedom of expression with the need to protect the government from outright libel, the Supreme Court proposed a formula under which the First Amendment would not provide protection to persons who intentionally published libelous information, with large weight being given to its libelous nature; when the publication concerned "public issues," dealing with the conduct of a public official, in order to recover damages a plaintiff must prove not only that the information was false, but "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[1]

In this decision, the Supreme Court laid down strict guidelines for the courts to follow which ruled out the awarding of damages in libel cases unless the jury established the existence of "actual malice" on the part of the defendant. The new standard to a certain degree impaired the government's ability to retaliate against criticism and was met by the public with various appraisals.

Conservatives were in an outrage about the Court's decision, charging that "it gave the press a writable license to defame public persons."[2] Militant liberals, however, thought the new standard did not go far enough to protect criticism of the government in the media.

Three justices, Hugo Black, William Douglas and Arthur Goldberg, although they concurred with the majority opinion in *New York Times Co. v. Sullivan*, issued separate opinions grounded on the "absolutist" approach to the First Amendment. Their arguments could be summed up as supporting the notion that the Constitution grants individuals and the press the absolute, unconditional right to criticize the actions of public officials no matter how great the damage that may ensue from abuse of this privilege. The three justices also noted that the definition of "actual malice" was too vague and lent itself to arbitrary interpretation by the courts.

Indeed, although the "actual malice" standard markedly diminished the chances in filing a suit against any publication authorities might dislike, it did not discourage entirely those eager to punish the media for criticism. Writes American lawyer Bruce Sandford, "Today we see a vast array of

1 376 U.S. 254, 280 (1964).
2 *Communications Lawyer*, Vol. 2, No. 4, Summer 1984, p. 24.

wealthy public people pressing libel lawsuits against ... the respectable news media."[1]

To be sure, the "actual malice" standard has not left the government totally powerless. When needed, government agencies seek out other legal ways to punish the media for "taking liberty" with facts, and under the conservative Burger Court, the application of this standard has acquired certain police overtones.

The Supreme Court issued a landmark ruling on the constitutionality of prior restraint in the *Near v. Minnesota* case, heard in 1931. In its decision, the Court held that the freedom of the press from prior restraint was not absolute; prepublication censorship was allowable in respect to sensitive military information (such as the size and location of troops), obscenity, materials inciting "acts of violence" in disturbance of the public order, or inciting the overthrow of the government, or publications that intruded on a person's privacy.

The 1971 Supreme Court decision on the Pentagon Papers case had a great impact on defining how much prior restraint the government could exercise over the media. Copies of these documents, consisting of a 47-volume classified Pentagon study of the Vietnam War, were made available to the press by one of the study's authors, Daniel Ellsberg.

In mid-June 1971, *The New York Times*, and a little while later, *The Washington Post*, began publishing excerpts from these documents. The government promptly filed a suit against the newspapers to halt publication, marking the beginning of one of the most heated disputes ever to be heard in the federal courts.

The newspapers, citing the First Amendment, were insisting on their right to publish the documents. The government, however, argued that making secret documents public might result in direct, immediate and irreparable damage to the security of the United States and that the First Amendment did not bar the court from halting that kind of publication. On the outcome of the case rested not only the political prestige of the government, which was anxious to keep under wraps the facts about the United States aggression in Indochina, but also the tactical interests of the Nixon Administration in the military and diplomatic fields.

The political atmosphere surrounding the case clearly did not favor the Administration: average Americans sided with Ellsberg and wanted to learn the truth about the U.S. intervention in Indochina, while the press talked non-stop about "censorship" and "attacks on the First Amendment" on the part of the Administration.

[1] *Communications Lawyer*, Vol. 2, No. 4, Summer 1984, p. 24.

Carefully examining the contesting arguments, the Court ruled that the government had not produced sufficient proof for the court to issue an injunction to bar publication of the Pentagon Papers. The majority opinion had argued that the First Amendment entitled the press to publish materials, whatever their source, without prior censorship. In "certain clear emergencies" the government could obtain a court injunction to halt the publication of certain materials, but in the given case no such circumstances were present; in the Court's view, contrary to the government's argument, the publication of the Pentagon Papers would not cause immediate and irreparable damage to the security of the United States, and a decision in favor of the government would create a dangerous precedent for the future by enlarging the government's ability to exercise prior restraint over the press.[1]

Conservatives and supporters of the Nixon Administration met the Court's decision with disgruntlement, while liberals welcomed it as a historic precedent that strengthened the hold of constitutionalism over freedom of speech and the press.

Yet in appraising this decision of the Supreme Court the following facts must be kept in mind. The Court's decision in favor of the press was not unanimous, with 3 of the 9 justices dissenting. What's more, no "majority opinion" was issued, rather, the decision was based on concurring opinions of the justices voting in favor of the newspapers. The majority stated that in "certain emergencies," prior restraint was permissible, and some members of the Court argued that the government was entitled to bring criminal charges against publishers for printing classified government secret papers.

Media coverage of court trials poses a major dilemma for the exercising of the First Amendment right of free speech, placing in conflict two central elements of American constitutionalism—free press and a fair trial. Coverage in the press and on radio and television of criminal trials as a mark of a free press is often so sensationalist and distorted that, as judges contend, it makes it difficult to guarantee a fair trial. For instance, the publication of a report about a particular crime or a defendant in a pending case before the trial may prejudice jurors, who are supposed to be guided by a presumption of the defendant's innocence, or leave them with a bias toward the case and cause them to favor the prosecution. Trial courts therefore often impose restrictions on media coverage of trials that remain in force until the verdict.

In the past, representatives of the media who criticized judges or distorted court proceedings in their coverage were often charged with contempt of court on the grounds that

[1] The New York Times Co. v. United States, 403 U.S. 713 (1971).

distorted information about a case distributed widely obstructed the administration of justice.

The general guidelines for bringing contempt of court charges against pressmen for their coverage of a pending case were laid down by the Supreme Court in the 1941 case of *Bridges v. California*, in which the Court ruled that prosecution on contempt of court charges for the publication of materials critical of the conduct of a trial was in principle an unconstitutional means of abridging freedom of speech and the press. In later rulings the Court upheld this principle.

In 1966, the Supreme Court reviewed the case of *Sheppard v. Maxwell*, in which Sheppard was appealing his conviction on the grounds that the presence at his trial of a large number of reporters, their interviews with witnesses and jurors and the publication of sensational materials made impossible an objective hearing of his case. The Supreme Court reversed Sheppard's conviction and established the rule that to ensure a fair trial courts could limit access of reporters to courtroom, control their conduct and exercise prior restraint on the publication of information not examined in the trial. This decision subsequently served as the legal basis for the issuance by courts of special orders ("gag rules") prohibiting the press from publishing certain materials about a trial.

In the 1970s, representatives of the media, citing the First Amendment, filed suits in courts, demanding free access to all court hearings, including closed sessions.

American reporters, always on the lookout for sensation, were very much pleased by the Supreme Court ruling in a 1980 suit filed by Virginia newspapers against the state. In the case *Richmond Newspapers v. Virginia*, the Court recognized the right of the press and the public to attend any criminal trial. Writing the opinion of the majority, Chief Justice Warren Burger argued that the free speech and press clauses of the First Amendment could be interpreted as entitling citizens to unrestricted access to all public information.

Immediately following the announcement of this decision, the American press began predicting that it could be invoked to broaden access of the press and public not only to all stages of criminal proceedings in courts, but also to other proceedings of government institutions.

Yet, it cannot be said that this decision produced a dramatic change in traditional rules of procedure under which a proceeding may be held "in chambers" on the motion of the government if classified information is to be disclosed during the trial or on the motion of one of the parties for the sake of protecting the confidentiality of absolutely private affairs.

The enthusiastic predictions as to the potential significance of the ruling on broad access of the press and public to "publicly vital information" have yet to be realized. Since

coming to office in 1981, the Reagan Administration has led a frontal attack on freedom of information, acting in circumvention of court rulings and statutes that previously expanded and strengthened this freedom.

4. POLITICAL LIBERTIES. THE MEANING AND REALITIES

An insight into the jurisprudence of the First Amendment brings one to the conclusion that since the 1950s the parameters of constitutional review in the realm of political liberties in the United States (despite the eclecticism and pronounced inconsistency of the standards modeled by the judiciary) are on the whole biased toward a liberal reading of the Constitution. In cases on freedom of speech, the press and assembly, a body of rules was gradually compiled by the Supreme Court that together markedly expanded the formal rights of citizens to express their opinions orally and in the press, criticize the government, form political organizations and launch protest actions. Reactionary federal and state statutes openly targeted against ideas and organizations undesirable for the capitalist state were effectively rendered harmless by rulings handed down by the Warren Court; they to a certain degree abridged the states' ability to enforce statutes, indirectly restricting the organized political activities of radicals or acts of individual self-expression.

The Warren Court significantly widened the legal basis for average citizens to take part in the political process. The liberal activism of the Warren Court in the area of individual political liberties helped to strengthen democratic elements of the capitalist legal order and caused a revision of legislative and administrative acts and their readjustment to bring them in line with constitutional standards and principles. The Court's ruling on the Brown case in 1954, for instance, provided momentum not only to the desegregation of public schools, but also to the legislative recognition of the constitutionally proclaimed right to vote for the blacks. The Court also struck down a number of the provisions of the McCarran Act as unconstitutional and reduced sharply the circumstances under which the Smith Act could be employed against critics of the government, thus causing the repeal of anti-Communist statutes in the states. In the area of the press, the standards issued for the application of laws on libel of public officials hinder, to a certain degree, the enforcement of relevant statutes in the states, thus curbing censorship of the press. The Warren Court's liberal activism in defense of political liberties made it the target of blistering attacks from the right; in Congress, numerous calls were

made for the impeachment of Chief Justice Earl Warren and Justice William Douglas, a devout liberal and defender of civil liberties. The liberal majority of the Court was accused of selling out the principles of Americanism and of the country's political traditions.

In exercising its authoritative function of constitutional review, the Supreme Court based its decisions on these very principles and traditions, invoking works of philosophers of the Enlightenment and the Founding Fathers, the protocols of the Constitutional Convention and political treatises written around the time of the American Revolution.

It is for this reason that the body of precedents, related to political liberties issued by the Warren Court in the 1950s and 1960s, remain in force to this day.

A reflection of the overall desire of the American capitalist state to build a public consensus on the ideas and values of constitutionalism, this body of decisions has managed by virtue of its wide liberal scope to incorporate all shades of American political thinking, including those that under present circumstances are amenable even to representatives of the ideological right. The reason for this is that in the United States, the Constitution, like the constitution of any other Western country, presents a picture of political reality that, as the Soviet scholar V.A. Tumanov puts it, is abundantly painted with "tones of democracy, political participation, equality and rule of law."[1] Interpreting the Constitution in this spirit in the final reckoning furthers the long-term interests of the ruling elite, leaders of all its political stripes. Because of these common interests, even conservatives support many of the liberal concepts of constitutionalism and are forced to appeal to the documents and principles making up the theoretical foundation of American liberalism.

It would be wrong, of course, to attribute the protection now being afforded to civil rights and political liberties simply to the goodwill of the ruling elite. Walking in the shadows of their great ancestors—the legendary Founding Fathers—politicians, legal scholars and judges proclaim themselves the heirs and continuers of the traditions of the American Revolution. Yet, the broadening of political rights and liberties came about as a result of a two-centuries-long struggle by the American people for freedom and democracy, and credit for the existence of legal guarantees of these rights in modern jurisprudence belongs to democratic forces who waged a stubborn fight to protect the Bill of Rights from right-wing encroachments.

Most noteworthy in this respect is that the Supreme Court,

[1] *Practice of Bourgeois Constitutionalism. Critical Essays*, ed. V.A. Tumanov, Moscow, 1982, p. 11 (in Russian).

even under the conservative leadership of Warren Burger since the early 1970s, has continued to uphold the Warren Court's line as regards the jurisprudence of the First Amendment *per se*. Despite general hostility toward the record established by the Warren Court, the present Court does not dare dismantle the liberal legacy of the 1960s. The judiciary has been by and large content with a broad interpretation of the formal guarantees of political rights.

We must now ask whether all this means that there are real guarantees to protect free speech, press and association for all and everywhere. Are the liberal prescriptions of the judicial branch a reliable guarantee of constitutional rights?

First, in the United States, constitutional rights and freedoms, like in all Western countries, have a class bias and are ultimately intended to further the preservation and strengthening of the mainstays of capitalist democracy in the political interests of the ruling elite.

Second, the genuinely democratic nature of the rights and freedoms proclaimed by the Constitution is in many respects neutralized or distorted in the political practice of present-day capitalist America. When their exercising comes into conflict with the current political interests of certain groups within the ruling elite or of the state as a whole, the state is swift to retaliate in the form of limitations on free speech found undesirable.

Here it is appropriate to cite on this score Judge Learned Hand, a well-known liberal exponent of constitutional law: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. There are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[1]

These reflections describe admirably that part of American political fabric which has long been typified by its scorn for deviant ways of thinking and unpopular opinions and beliefs, by deeply-rooted conservatism, superpatriotism, conformism and hostility toward left-radical dissent.

A truly democratic apprehension of political liberty is alien to mass bourgeois thinking. Liberty, as it was understood by Judge Hand, does not lie in the heart of a bourgeois, of a philistine. Yet it is the mentality of a philistine that by and large shapes the realities of the political fabric in the United States. Soviet novelist Boris Pilnyak, upon return from a trip to the United States in the early 1930s, summed up his impressions

[1] Cited in Thomas I. Emerson, *Toward a General Theory of the First Amendment*, p. 26.

as follows: "A philistine! Yes, this is the largest America that I discovered in my quest of America... This mentality is safeguarded by the standards of American 'democracy,' by legends of individual liberty, by dreams of becoming a millionaire, by the fear and courage of loneliness, by exuberant health."[1]

Not only during the McCarthy era but also later, in the 1960s and 1970s, many Americans, who in a sidewalk survey were asked to sign a text of the Bill of Rights or Declaration of Independence in the form of a petition, refused to do so, and some even threatened to call the police. In 1975 the magazine *Saturday Review* wrote that "not long ago it was found in a series of opinion polls that *if the Bill of Rights were up for adoption today, a majority of Americans would vote it down.* "[2]

An American bourgeois does not, of course, reject the idea of freedom totally, the love-of-freedom rhetoric is characteristic of any conservative, after all. He extols America as a country offering "liberty and justice for all." In his mind, liberty is the same attribute of Americanism as religion and the flag, patriotism and anti-Communism, the Bible and the Constitution, law and order, private property and private enterprise. Yet, the average American has a hard time accepting the liberal notion that freedom of expression should be extended also to those who reject or not wholly accept values of Americanism.

That a legal doctrine is handed down by the Supreme Court does not mean it will be everywhere enforced—in American society many important individual liberties lack the requisite legal compulsion. It sometimes occurs that much time passes before major Supreme Court decisions become known to the public and are enforced by authorities. With the exception of a few large newspapers and magazines, most mass circulation publications devote little if any space to Supreme Court decisions, and television—from which most Americans get their news—gives only superficial coverage to Court pronouncements. Analyzing in detail the Court's decisions and predicting their implications for everyday life is the work of an elitist circle of experts, lawyers and law professors.

The implementation of a liberal court decision may be obstructed either by the indifference, or, on the contrary, by the overzeal of a conservative, a champion of traditional values of Americanism. "Take the law into your own hands" is his old-time maxim, rooted in traditions of the well-to-do colonists, Southern plantation-owners and pioneers of the

[1] Boris Pilnyak, *OK. An American Novel*, Moscow, 1933, pp. 196, 197 (in Russian).

[2] *Saturday Review*, April 5, 1975, p. 12 (italics added).

Wild West, whose attitudes helped bring about lynch law, mob violence against opponents of slavery, the forcing of aliens to kiss the flag, beatings of Wobblies, raids on radical printing plants and barring the blacks from universities. In America this attitude is still alive.

When a bigoted citizen is empowered to make decisions and to act—in the police, municipal government or executive agency—he can effectively ignore a liberal decision, or, for that matter, work against it. "Purporting to affect what the police do, courts render their decisions confident that the police will manage. The police, for their part, listen respectfully—and circulate mimeographed analyses of the latest judicial opinions and then go to work."[1]

In *Fools Die*, a novel by Mario Puzo, one of the characters describes the attitude of a police chief to the Constitution: "'You have to understand,' Cully said, 'that the deputy police chief of Las Vegas is what the old kings used to be. He's a big fat guy who wears a Stetson and a holster with a forty-five. His family has been in Nevada since the early days. The people elect him every year. His word is law... Now you have to understand the chief considers the Constitution of the United States and the Bill of Rights as an aberration of milksop Easterners.'"[2]

A particular threat to democratic institutions is posed by resistance to liberal interpretations of the Constitution by high-ranking government officials. Speaking before the Federal Legal Council in Oct. 1981, William French Smith, Attorney General in the Reagan Administration, stated frankly: "At the very least, this multiplication of implied constitutional rights—and the unbound strict scrutiny they produce—has gone far enough. We will resist expansion."[3]

Warning of the need to take a sober look at real state of matters in civil rights, American law scholar Ann F. Ginger points out that even when the Supreme Court "has ruled that the people legitimately exercised constitutional rights, the matter is not always settled for everyone then and there, as some of the following cases illustrate. Sometimes the decision comes too late and sometimes it is not obeyed by the individuals who have the power to either protect or infringe rights at the time they are exercised."[4]

In these circumstances, the individual is put in a situation where the exercising of his formally guaranteed rights

[1] Lloyd L. Weinreb, *Denial of Justice*, pp. 14-15.

[2] Mario Puzo, *Fools Die*, G.P. Putnam's Sons, N. Y., 1978, p. 60.

[3] Remarks of the Honorable William French Smith, Attorney General of the U.S., before the Federal Legal Council. Oct. 29, 1981. Department of Justice, *Press Release*, p. 6.

[4] Ann Fagan Ginger, *The Law, the Supreme Court, and the People's Rights*, Barron's/Woodbury, N. Y., 1977, p. 27.

hinge largely on his own abilities and economic status; the legal procedures for challenging an unconstitutional action of an official are cumbersome, time-consuming and require great amounts of money: "The victories for human freedom ... often were won after several years had been spent in pretrial motions, a jury trial and conviction, a reversal on appeal, a second jury trial and conviction, a second reversal on appeal, sometimes a third jury trial, followed finally by a Supreme Court decision on a procedural point raised in a habeas corpus proceeding."[1]

The notion that the exercise of political rights in the United States depends largely on the ability of the individual to guard these formally declared rights energetically from encroachment has been expressed also by other American authors who are authorities on civil rights in America. Nat Hentoff, for example, argues that "Once the Supreme Court has handed down a decision, the work of the citizenry ... may have only begun. Where there is official resistance, often hidden, to a particular ruling, any concerned citizen can become a working constitutionalist by fighting that resistance... Otherwise, even a Supreme Court decision will not get off the paper on which it's written."[2]

In the first quarter of this century, these "working constitutionalists" who fought their way through the court system to uphold their right to free speech and who in doing so helped for the jurisprudence of the First Amendment were labor leaders, socialists and pacifists. Truly formidable was the struggle of the Communists and their lawyers at courts of various levels to have reactionary laws overturned and for their right to adhere to Marxist views and belong to their party.

In the 1960s, the "working constitutionalists" were the opponents of the Vietnam War and civil rights activists—nonviolent demonstrators, adherents of "symbolic speech" protest who withstood repression and police violence to uphold their rights.

Individuals who did not belong to any political movement but who sought to express themselves, albeit in an eccentric form, to challenge the conformism and moral hypocrisy of a bourgeois had contributed their mite to the jurisprudence of the First Amendment. These social "outcasts," harassed by the police, made their way through the judicial hierarchy to the Supreme Court to uphold what was purportedly granted to them by the Founding Fathers. Several landmark decisions on the First Amendment were handed down by the Su-

[1] Ann F. Ginger, *The Law, the Supreme Court, and the People's Rights*, pp. 230-31.

[2] Nat Hentoff, *The First Freedom*, p. 8.

preme Court in the 1930s and 1940s, on appeals filed by the "unpopular" Yehovah's Witnesses religious sect. They challenged numerous municipal ordinances prohibiting members of this sect from giving speeches in public and distributing their literature. Since 1938, the Supreme Court reviewed more than 30 cases connected with the activity of the sect that had a direct bearing on the interpretation of the First Amendment. In the majority of these cases the Court upheld the right of the plaintiffs to freely express their beliefs.

The campaign to defend and broaden constitutional liberties was waged not only in the courts. *Politically*, it originated in the American colonists' fight for independence from the British Crown, and did not end with the adoption of the Constitution and the Bill of Rights. From the very beginning of United States history the American people have had to protect from encroachment on the part of reactionaries the fruits of the American Revolution embodied in these two documents and to expand, mainly by political struggle, the content of democratic institutions expressed therein.

Today official quarters in the United States try to present the constitutional system in the country as the universal and supreme standard of democracy, one that is in full accord with the visions of the Founding Fathers. History shows, however, that the development of the American government has been attended by restrictions on political rights and liberties—despite the "absolute" prescriptions of the First Amendment. All the unconstitutional actions taken to suppress dissent—the Sedition Act of 1798, the actual denial of the right to vote and other political rights to blacks, the Palmer repression of keepers of "evil thoughts," the McCarthy witch-hunts, the harassment of antiwar and civil rights activists, and the Watergate scandal, which among other things revealed violations of the constitutional rights of individuals—have today been declared "incidental deviations."

The question is, don't these "incidental deviations" reflect the government tendency in "the protection" of the political rights of those individuals or groups whose political views or activities do not suit the capitalist state? Today, in the 1980, the rhetoric of President Ronald Reagan and Administration officials is full of praise for the Constitution, the Bill of Rights, American democracy and freedom. In his State of the Union Address to the U.S. Congress in 1985, President Reagan spoke of America's "mission ... to nourish and defend freedom and democracy."[1]

Yet, progressives and liberals in America have a different opinion on this matter. One of them, Richard L. Criley, writes, for instance, that "no President in our history has

[1] *The New York Times*, February 7, 1985, p. B8.

talked more about the defense of democracy and done so much to destroy it."[1] This thought is echoed by the American Civil Liberties Union, which contends: "For the first time we face an administration that seems firmly opposed to key legal and political principles upon which our constitutional system is based... There have been other dangerous periods for civil liberties—for example, the periods dominated by Joseph McCarthy and Richard Nixon. But those men were not ideologically committed to making fundamental changes in our legal structure. They had no particular theory of government. They were driven by personal ambition and to be sure, they did not hesitate to sweep the Bill of Rights aside when it was an obstacle... But for this Administration, the erosion of the Bill of Rights seems to be a primary goal, not a side effect. This Administration seeks to make structural changes in our system of government that, should they succeed, will not be easy to overcome once their time in office passes."[2]

The tendency of the ruling class to avoid persistent implementation of the basic ideals of constitutionalism is opposed by the tendency of the American people to defend and broaden political liberties. Throughout history the American people have been "working constitutionalists" who have unrelentlessly defended and strengthened democratic institutions through various forms of political struggle, thereby compelling the ruling quarters to make concessions and agree to statutory, judicial and constitutional novelties of liberal design.

The true scope of political liberty depends not on the good graces of the ruling class or on its declared commitment to human rights, but on the correlation of political forces in the United States—the balance between reaction and democracy, and on the ability of broad segments of the populace to defend their constitutional rights.

The current situation in the United States is defined by the fact that the regime of capitalist democracy and its attendant political and legal institutions with all their faults still prevail. This means the reactionary tendencies of the ruling quarters have been neutralized to a certain extent by the democratic tendency of the people.

Political rights and freedoms in the United States, even as they are presently interpreted by the courts and guaranteed to the citizens, are in many respects declarative. Their declarative nature is manifest primarily in the fact that, owing to

[1] *Crime and Social Justice*, Nos. 21-22, 1981 (Special Double Issue), p. 188.
[2] *Civil Liberties in Reagan's America. ACLU Report*, N. Y., pp. 1, 2.

the individualistic nature of American constitutionalism, they are not backed materially by the capitalist state, and their real significance is considerably diminished by the absence of legal guarantees of basic socio-economic rights.

American legal scholars representing progressives and liberals, notwithstanding their professional idealization of the Bill of Rights, acknowledge that no matter how broadly political liberties are proclaimed in the United States, they cannot be consistently exercised in the conditions of American capitalist society, which refuses to provide its citizens with socio-economic rights. This point is underscored by former Attorney General Ramsey Clark, who has made a reputation as a champion of liberal viewpoints: "Most growth of the idea of political rights has been among those sharing economic power and designed for their own benefit... *No political freedom, no human rights, not even legal justice can be assured to people who do not have economic rights*. The human rights guaranteed by the Bill of Rights in the U.S. Constitution cannot be fulfilled unless economic rights are fulfilled."[1]

In the United States neither the Constitution nor federal legislation contains guarantees of such rights as the right to a job, to education, medical care, housing, etc. Under public pressure Congress has made sporadic attempts to legislate specific socio-economic rights, yet in American capitalist society such legislation stands no chance of being adopted.

It should be mentioned that the potential of guaranteeing citizens specific socio-economic rights does exist in judicial doctrine. In constitutional law there is the concept of "fundamental" or "basic" rights of citizens. In the 1960s the Supreme Court under the leadership of Earl Warren broadened the notion of "fundamental" rights to include those rights which are not only mentioned by the Constitution but also implied by it.

By interpreting constitutional rights in this way, the Supreme Court made it possible to extend the constitutional protection of "fundamental" rights to socio-economic rights of citizens. Yet the Court refused to recognize as "fundamental" such basic human rights as the right to a job, to housing, medical care, education and social security. The unwillingness of the Warren Court to extend the concept of "fundamental rights" to the sphere of socio-economic relations was even more pronounced in the activities of the conservative Burger Court.

In capitalist America, where citizens are denied outright guarantees of socio-economic rights, freedom of expression is often exercised in vain, that is, the end that is intended

[1] *Guild Notes*, September-October 1982, p. 12 (italics added).

to be achieved is not realized. Poor, homeless or unemployed Americans can vilify the government to their hearts content for neglect of their misfortune, but in conditions when social programs for the poor are being cut by the President and Congress, and the courts refuse to confer constitutional protection on socio-economic rights, the exercising of their freedom of speech does little to help improve their condition in life. In capitalist society, man is in effect left to his own devices.

The question of the material guarantees of political liberties is also resolved in full accordance with the principle of bourgeois individualism. For the overwhelming majority of Americans, opportunities for exercising freedom of expression are limited for economic reasons. Analyzing the essence of American democracy, J. Cohen and J. Rogers observe: "The political rights granted to all citizens, workers among others, are formal or procedural, and not substantive. That is, they do not take into account in their own form and application the inequalities in the distribution of resources, characteristic of capitalism, which decisively affect the exercise of political rights and importantly limit their power of expression. Both an unemployed worker and a millionnaire owner of a major television station enjoy the same formal right of free speech, but their power to express and give substance to that right are radically different."[1]

In examining the nature of freedom of expression in American society, it is extremely important to keep in mind that this freedom is subject to harsh restrictions at the workplace: in factories, corporations, educational institutions, government and private institutions, the office, etc. Various company rules and internal regulations prohibit employees from expressing opinions that go counter to those of the management. Criticism of the head of a company or government agency is often dealt with by disciplinary action, and the threat of dismissal perpetually hangs over those who are bold enough to exercise their right of free speech and criticize their bosses. The threat of dismissal in a country where unemployment is a reality for millions has a chilling effect on the open expression by employees of their opinions of their employers.

This turns companies and institutions into enclaves where constitutional guarantees are no longer operative. This phenomenon is witnessed by psychoanalyst Dr. Douglas La Bier, who notes: "Most large firms remain complex bureaucracies in which the individual gets lost. In such settings, employees often have to chip away at their own sense of integrity to get ahead. People find themselves agreeing with

[1] J. Cohen, J. Rogers, *On Democracy*, p. 50.

everything a superior says because they fear the consequences of speaking their own minds. They fear that criticism will end up derailing their careers."[1]

A proper appraisal of the measure to which Americans are able to exercise their political rights is impossible without taking into account the fact that beginning in the 1960s, the authorities who were forced to stop prosecuting political dissenters on the basis of laws subsequently found unconstitutional, began to find new ways to openly restrict political liberties and to punish opponents—in particular, by bringing trumped-up criminal charges against political, civil rights, etc. activists.

The use of criminal laws to harass the political opposition conceals an attempt by the capitalist state to pretend as though people in the United States are no longer persecuted for their beliefs. Now, if a political activist is convicted, it is on "purely criminal" charges, and this, it is alleged, has nothing to do with political dissent.

Having enlisted the support of conservatives and the "silent majority"—a segment of the public alarmed by the increase in crime and united around the slogan of "law and order," the Nixon Administration mounted a tough drive to strengthen law and order in the country. This campaign boiled down to increasing the powers of the police and the prosecutors and decreasing the procedural guarantees of justice which, the Administration contended, benefited only criminals. However, the edge of the campaign was in fact pointed against the antiwar, student and civil rights movements. A look at the events of the 1960s and 1970s provides ample illustration of the fact that activists who fought for peace, racial equality and social justice were brought to court on criminal charges, both at the federal and state levels.

During the Nixon presidency restrictions were lifted from the use of electronic eavesdropping and surveillance techniques on the grounds that they were needed to ensure "domestic security." The Watergate affair was a totally logical result of law-enforcement policies of the time, which widely employed electronic espionage not only against criminals and political dissenters but also against rival political candidates. The Watergate affair eventually led to the resignation of the President and the prosecution of some of his close associates. The call for "law and order" which came to symbolize tough law-enforcement was thus discredited in the eyes of the public.

Precise information on the scale of politically motivated prosecution in the United States is difficult to obtain owing to the fact that the authorities treat as a crime all political

[1] *U.S. News & World Report*, April 29, 1985, p. 73.

activity which, though quite constitutional, is not to their liking. The American mass media usually adhere to the version offered by the authorities, portraying political activists as ordinary criminals. Yet, in spite of this, many facts are appraised properly and given due publicity. One notable case came to light in July 1978 in the middle of President Jimmy Carter's campaign for human rights in the socialist countries, when the U.S. Ambassador to the United Nations, Andrew Young remarked that "there are hundreds, perhaps even thousands of people whom I would call political prisoners" in the United States. In December of that year, three American organizations—the National Conference of Black Lawyers, National Alliance Against Racist and Political Repression, and Commission on Racial Justice-United Church of Christ—addressed a petition to the United Nations Commission on Human Rights in which were cited numerous cases in the United States of violations of political rights and the criminal prosecution of people for their political convictions. A condensed text of the petition was published as a book by Lennox S. Hinds, an Associate Professor of Criminal Justice at Rutgers University.[1]

The persecution of political activists by bringing criminal charges against them is the capitalist state's way of reacting to the political views and related political acts it does not approve of. In effect, the state punishes people for exercising their right to express their political views, for pooling efforts and taking part in organized action—that is for exercising all those political rights which stem from the Constitution.

In carrying out "purely criminal" prosecution of political opponents, the state must at the same time make sure to balance its desire to suppress political dissent with the need to maintain its own prestige as the "wise head of the family" who is more interested in "teaching" than in punishing. In connection with this, the treatment of political dissidents in the American criminal system has been marked by a certain tendency toward leniency in handing down sentences—what is important here is not the length of the sentence, but the resoluteness displayed in handing it down.

In rejecting mass prosecution of political opponents, the state can save punishment for selected individuals. The state may also channel some of its unexpended energy into keeping dissenters under surveillance. Observes Harvey A. Silverglate: "But the government is not interested only, or perhaps even primarily, in winning cases and in putting dissidents behind bars... The point has been made—the government would follow, investigate, film, photograph, and prosecute selected enemies of the Republic who would serve as warnings and examples to others."[1]

[1] Lennox S. Hinds, *Illusions of Justice. Human Rights Violations in the United States*, School of Social Work, Univ. of Iowa, 1978.

Another fact witnessing the real situation with political rights and liberties is that even amid a liberal shift in the courts' attitude to the First Amendment guarantees, Americans simply refrain from expressing unorthodox views publicly, fearing the wrath of authorities in the form of surveillance, compiling of a dossier, dirty tricks, harassment at work and other widely employed types of masked persecution of any dissent, which have a "chilling effect" on the exercise of political rights. Beginning in the 1950s, the Federal Bureau of Investigation mounted a large-scale clandestine operation to spy on citizens, that became known as the "Counter Intelligence Program," or COINTELPRO. It boiled down to F.B.I. agents' and informants' working within organizations and against persons not subject to criminal prosecution due to lack of legal grounds for it. The first part of this program, enacted in 1956, was targeted against the Communist Party U.S.A. In the late 1960s, the program was turned against youth and black organizations. The program demonstrated an abundance of provocation methods. Overall, more than 2,370 clandestine operations were conducted within the framework of COINTELPRO.

By infiltrating its agents or informers in organizations or by regular eavesdropping and secret searches, the F.B.I. is able to control the work and plans of these organizations. The information thus gathered can also be used to undermine or discredit organizations: "/F.B.I./ informers, infiltrators and wiretappers delved into the activities of even the most innocuous and nonviolent civil rights and antiwar groups, trampling on the rights of citizens to express grievances against their Government. /F.B.I./ spies within potentially dangerous extremist groups sometimes provoked more violence than they prevented."[2]

In these years other American intelligence services also spied on citizens, including the Central Intelligence Agency, the National Security Agency and the Department of Defense.

The objectives of this kind of intelligence operations, not entailing criminal prosecution, are to secure control of politically active groups and gain access to a steady stream of information about them. In the United States, such activity is called "domestic intelligence" and has a "chilling effect" on the exercise of political rights, since a person who is unsure of which views are acceptable to the authorities prefers to remain silent altogether so as not to attract the attention

[1] *Criminal Justice in America. A Critical Understanding*, pp. 138-39.
[2] *Time*, December 22, 1975, p. 30.

of intelligence agencies.

Although COINTELPRO was officially abandoned in 1971, activities of this sort have since continued, albeit on a lesser scale, under the heading of "investigation."

During the unwinding of the Watergate affair it became known that President Nixon had tried to manipulate the F.B.I. and the C.I.A. for partisan purposes of his party. As a result, two committees were set up—one appointed by the President, the other by Congress—to investigate the activities of intelligence agencies, including the F.B.I. The Attorney General issued special directives which strictly regulated the kinds of investigations the F.B.I. could conduct and how they could be conducted. The C.I.A. was prohibited from carrying out operations against American citizens within the country.

The revelations of illegal operations by the F.B.I. and subsequent steps to legally regulate the agency's activities made some people start talking of a "new age" for the F.B.I. in which the F.B.I. excesses of the past would remain part of history and the "secret wars" against dissidents would be halted. This liberal euphoria lasted a week. With the coming to power of the Reagan Administration, the intelligence agencies were gradually given back their powers to spy on citizens. In December 1981 executive order No. 12333 was issued which allowed the C.I.A. to legally conduct surveillance of American citizens and organizations on U.S. territory. The F.B.I. was also given increased authority to conduct surveillance and undercover operations, importantly—by executive order and not on the basis of a Congressional statute. The above-mentioned executive order authorized the F.B.I. to infiltrate its agents in public organizations the authorities believed to be influenced by foreign states. This order can serve as the legal basis for harassing antinuclear groups, for none other than the President himself once accused the peace movement of being run by "Soviet agents."

The providing of a new legal basis for suppressing political dissent in violation of constitutional guarantees is another direction of the repressive policies of the U.S. ruling quarters. In the late 1960s and early 1970s, a series of federal criminal statutes were enacted that broadened the powers of the police and the prosecutors and made it possible to use them against the political opposition. For example, the 1968 Omnibus Crime Control and Safe Streets Act made legal electronic surveillance and wiretapping. Another federal law, the Organized Crime Control Act of 1970, contained a definition of a "special dangerous offender." Yet the definition was so broad that it could be applied to persons whose views

and political activity seemed dangerous to the authorities: organizers of antiwar demonstrations, civil rights activists or members of a strike committee. After a careful analysis of the new laws, Soviet scholar B.S. Nikiforov concluded that their "real aim is to arm the government in its political war with dissenters."[1]

The record has confirmed this. For instance, the 1970 Organized Crime Control Act expanded the powers of the Grand Jury, prompting American scholar Jeff Gerth to write: "Most of those who have suffered under the Organized Crime Control Act are political activists. Leslie Bacon, Sister Jacques Egan (friend of the Berrigans), and Anthony Russo (colleague of Daniel Ellsberg)—all have spent time in jail as a direct result of the expanded grand jury powers granted government prosecutors... Government prosecutors, led by Guy Goodwin of the Justice Department's Internal Securities Division, turned federal grand juries into rubber stamps in this new method of radical witch-hunting. Meanwhile, organized crime cases were shunted aside and ignored."[2]

Since the late 1960s, various proposals have been made for the drafting a new federal penal code. The right-wing forces in the United States would like to use the drafting of a new code for their own benefit so as to tighten criminal law and offer the government new ways to carry out political repression.

The Reagan Administration has also advanced proposals for reshaping the federal penal code. These proposals touch on a wide range of problems dealing with criminal law procedures that have long needed to be resolved. Among them are the standardization of sentences, including the death penalty, the regulation of the discretionary powers of the courts, the prevention of repeat offenses, and the adjustment of procedures for serving sentences and parole. The initiatives are made to appear as purely legal reforms so as not to give the public grounds to accuse the Administration of returning to the "law and order" policies of the Nixon Administration, and conceal that the program has political edge pointed at political opponents. That's why the Reagan Administration has spoken much about the need to more effectively combat crime, protect law-abiding citizens from criminals, expand the rights of crime victims and limit those of the criminals.

Yet, in the Administration's proposals to broaden the application of the death penalty, stiffening the sentences, and conditions of the parole, limiting bail and the power of the courts to supervise police activities and overall review powers of the courts can be seen a bid by conservatives to abandon

[1] *USA: Crime and Politics*, ed. B.S. Nikiforov, Moscow, 1972, p. 359. (in Russian).

[2] *Criminal Justice in America*, p. 224.

liberal principles of justice. The Administration's proposals are based mainly on punitive approaches and represent more a threat to the constitutional guarantees of political rights and liberties than to criminals. Also, all of the Administration's proposals are aimed at reducing the procedural guarantees of justice and individual rights while granting greater powers to the government.

Side by side with this goes the process of steadily expanding the punitive capability of the intelligence services—primarily the Federal Bureau of Investigation—to conduct clandestine operations against political activists. The Justice Department's new guidelines for the F.B.I. that came into effect on March 21, 1983 granted the Bureau increased powers to spy on citizens and organizations. It can now infiltrate its agents and informers in organizations which it and the Justice Department regard as terrorist or threatening the domestic security of the United States. History witnesses, however, that the government tends to regard in this category above all those who are disliked by the authorities because of political, rather than criminal, activities. "Analysis of the guidelines reveals that the Government in fact intends to cast a broad net to fish for political dissidents," observes *Guild Notes*.[1]

Under the Reagan Administration all-out psychological warfare was waged against members of the antiwar movement who criticized the Administration's militaristic policies that included attempts to portray them as "foreign agents" and "enemies of the nation." The signal announcing the beginning of the campaign was given by Reagan himself, who, frightened by the summer 1982 upsurge of the country's peace movement, charged that "Soviet secret agents" inspired that movement. Various chauvinistic organizations like the Moral Majority joined in the slander campaign, as did the U.S. Information Agency, which disseminated the lie overseas.

The threat of "international terrorism" was intentionally inflated by the Reagan Administration to ease the way for the adoption of antidemocratic measures. In the fall of 1984, Congress approved legislation proposed by the Administration to combat terrorism. The vague formulations of the laws allow U.S. intelligence services to formally investigate or conduct clandestine operations against political organizations critical of the government. In April 1984, the President issued a directive (NSDD-138) allowing "anticipatory strikes" to be made against groups thought to be preparing an act of terrorism. To implement the measures for combatting terrorism, an interagency group was set up composed of representatives of the F.B.I., the C.I.A., military

[1] *Guild Notes*, May-August 1983, p. 6.

intelligence, the Secret Service, the Treasury Department and the Federal Marshals' service of the Department of Justice.

In a special issue of the journal *Crime and Social Justice* devoted to an analysis of conservative trends in law enforcement, it is noted that the "government's campaign against 'terrorism' in the United States is selectively aimed at progressive organizations... The specter of 'terrorism' is being fabricated to legitimate the expansion of the repressive apparatus."[1]

The ideological attitudes, legislative proposals, administrative acts and practical actions of the Reagan Administration in the law enforcement field testify to the fact that the current policy of the government in this sphere is irreversibly biased toward the use of harsh measures to protect law and order. What we are seeing is a revival in the country of the same policy of "law and order" that was discredited toward the end of the Nixon presidency. The present policy, however, is more than just a rehash of past programs. In the 1980s, the federal government does not itself organize sweeping punitive actions against political activists, does not prosecute them in well publicized trials. Instead, the present Republican Administration systematically pursues the long-term objectives of building a formidable ideological and legal basis for "lawfully" crushing political dissent, imposing restrictions on constitutional rights and freedoms and bringing about conformism.

As a result, the conservative ideology of "law and order" has begun to be felt at all levels of the U.S. law enforcement system. According to Tony Platt and Paul Takagi, "repressive policies of law and order, which not too long ago appeared to be monopolized by right-wing political organizations and alienated petty bourgeois intellectuals, are rapidly becoming the conventional wisdom in the White House, Congress, state legislatures, and academia."[2]

In recent years there has been a perceptible shift in the repression of political dissent away from the federal government to the states. At the state level, political activists and protest demonstrators are frequently charged with violating state laws or city ordinances in an attempt to harass them.

In 1982, for example, according to data published in the American press, more than 4,000 people were arrested in the United States for demonstrating near military bases. During the course of seven demonstrations organized by the Livermore Action Group, a peace group, in 1983, 2,474 arrests were made by the police. In 1984, the prosecution and police harassment of individuals exercising their constitutional right

[1] *Crime and Social Justice*, No. 15, Summer 1981, p. 3.
[2] Ibid., p. 4.

to protest took on mass proportions. In July 1982, antiwar activists who became known as the "Orland Eight" were sentenced to three years' imprisonment. In Syracuse, seven peace campaigners were given jail terms ranging from two to three years. And in Pontiac, 50 antinuclear marchers were tried all at once.

Nearly 500 people were arrested in San Francisco during the holding of the Democratic National Convention, and another eight had to be hospitalized because of injuries inflicted by the police. In preparing for the Convention city authorities spent three million dollars, mostly to pay for the services of a dozen detective agencies which were employed to track down potential trouble-makers.

According to the press, in 1984 a total of more than 1,100 arrests were made of participants in peace demonstrations, against 577 of whom charges were filed.

The American capitalist state constantly searches for "lawful" ways to abridge free speech also in the area of lawmaking by courts. The creation by the Supreme Court of a body of rules governing the exercise of the right to free expression in its liberal cover seriously affected the interests of the ruling classes. Yet only the extreme right brought itself to criticize the Supreme Court for respecting the principles of constitutionalism as they applied to political liberties. But it was not until the Court under the leadership of Earl Warren began to interpret broadly the procedural rights of citizens and weaken police powers that conservatives of all stripes expressed anger over Court policies.

The Warren Court was accused of abetting criminals and of refusing to protect law-abiding citizens and the entire society from criminal elements. But were conservative critics of the Supreme Court really concerned about the rights of law-abiding citizens? No. The truth is, the "law and order" campaign was really aimed at reshaping the ideological make-up of the Supreme Court so that the Court's decisions echoed the Administration's policy of repressing political dissent. In the middle of the first Nixon Administration new members were appointed to the bench, including a new Chief Justice, Warren E. Burger, who shared conservative views of the Administration.

Although the Burger Court did not undertake a wholesale dismantling of Warren Court decisions, it did proceed in the 1970s to erode them little by little. Prof. Yale Kamisar of the University of Michigan observed in this respect: "Reading the criminal law decisions of the Burger Court is like watching an old movie run backward."[1]

[1] *The New York Times Magazine*, November 11, 1979, p. 27.

Making references to the need for "normal" conditions for police and court investigation, the Supreme Court ruled that the police have the unlimited right to search newspaper offices to obtain evidence[1] and that newspapers and journalists may be forced to disclose confidential sources of information.[2] In 1979, the Supreme Court ruled that "the actual malice" standard required inquiry into the editorial process—the pre-publication thoughts, conclusions and conversations of editors and reporters—by persons who charge they have been libeled by the product of that process.[3]

The American court system makes wide use of so-called "gag-rules," under which the press is barred by judicial order from publishing articles containing certain types of information about pending court cases. In the Court's full-scale review of a gag-rule in 1976, all nine justices held the challenged order an unconstitutional prior restraint on the press: "This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed."[4] In a 1979 case the Court held that the press and the public may be barred from attending a pretrial hearing.[5]

The American press and the public not without reason see in all these rulings an encroachment on the freedom of speech and the press, masked as concern about the effectiveness of the police and the prosecution to combat crime. The Reporters' Committee for Freedom of the Press observed that in handing down these rulings, the Supreme Court had thus rejected the constitutional protection of the editorial process and placed the thoughts and judgments of journalists at the liberty of the courts.[6]

The Supreme Court rulings on criminal justice made in the 1970s clearly witness a pronounced shift to the right in the area of constitutional principles of justice. This shift was met with approval by the prosecutors and police, who saw in the Court's decisions the basis on which to expand and strengthen the powers to repress political dissent, sidestepping the constitutional rights and freedoms formally possessed by Americans. In this context *The New York Times Magazine* pointed out on November 11, 1979 that "the prosecutors and the police ... feel they have a friend in the Burger Court, no ambiguity about it, and they express their appreciation in the most eloquent, effective way they can: by never blaming the Supreme Court for fostering crime" (p. 27).

[1] Zurcher v. The Standard Daily, 436 U.S. 547 (1978).
[2] Branzburg v. Hayes, 408 U.S. 665 (1972).
[3] Herbert v. Lando, 441 U.S. 153 (1979).
[4] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 570 (1976).
[5] Garnett Co. v. De Pasquale, 443 U.S. 368 (1979).
[6] See *The News Media and the Law*, May-June 1979, p. 2, 6.

The government's policy toward freedom of the press, freedom to distribute information and make access to it poses a threat to the constitutional principles. The current Administration set out to introduce "order" in the information media immediately after coming to office. In its first year and a half in office alone, it acted 26 times to restrict the access of the American public to information.

On March 8, 1983, President Reagan issued a directive instituting administrative censorship of all articles and books written by government employees with access to classified information. This directive in effect denied for life the constitutional right of tens of thousands of government employees to express their views in public.

From the very first days in office, the Reagan Administration began to make systematic attacks on the 1966 Freedom of Information Act. This comes as no surprise if you take into account the key part this Act played in the mid-1970s in making public many documents that revealed the illegal activities of the government and the years of abuses by the C.I.A and F.B.I. Already at the time of the Carter Administration the Act began to draw sharp criticism from the right. President Reagan surpassed his predecessor in his hostility to the law.

In October 1984, President Reagan signed into law a bill that nearly totally deprived the American public of the right to information about the Central Intelligence Agency. According to the bill, the C.I.A. can now arbitrarily declare any information regarding the agency's activities as not subject to disclosure under the Freedom of Information Act.

While signing the bill, President Reagan called it an "important step" toward freeing intelligence agencies from "unnecessary work" connected with the examination of public requests for information. Yet the new bill is formulated in a way that guarantees that information about C.I.A. operations will never see the light of day.

The Supreme Court has upheld the practice of the Administration to withhold information from the public. In April 1985, in *C.I.A. v. Sims*, the Court ruled that the C.I.A., notwithstanding the Freedom of Information Act, had a right to withhold information about sources of intelligence information, be that source a person or a publication, even one that is available to the public.

The position of the Reagan Administration on the tight control of information violates the rights of the academic community, restricts publications and impedes the exchange of scientific information among scientists and scholars of various countries.

In a setting of artificially fanned secrecy and suspicions fueled by the myth of a "Soviet threat," attempts have been

observed in the United States to revive the spirit of McCarthyism. Recently a nationwide campaign was mounted to seize "unauthorized" literature from school libraries. Bans imposed by self-styled censors from library and school boards on what children can read have taken on alarming proportions. Between 1980 and 1982, the number of books withdrawn from school libraries increased five times. In 1981 alone more than 150 books were banned in 38 states, many of which were from among the classics of English and American literature.

During this wave of neo-McCarthyism, attempts were made by the government to hamper the showing of certain foreign films in the United States. In January 1983, for example, the Department of Justice branded three Canadian films (including the famous antiwar film, *If You Love This Planet*) as "foreign propaganda." Under the Foreign Agents Registration Act, persons disseminating "foreign propaganda" are required to register with the Department of Justice as "foreign agents" and inform the Department about the time and place "the propaganda" is to be distributed and also about the persons and organizations receiving and using this information. The showing of films is thus controlled by the government.

The Reagan Administration has of late undertaken attempts to limit the access of the American public to information from abroad. Under the pretext of concern for national interests, it has imposed restrictions on the distribution of publications by foreign progressives and of materials telling of the successes of the socialist and developing countries. In May 1981, for instance, U.S. Customs officials confiscated Cuban publications sent to American addressees informing them they must have government permission in order to receive the publications.

Another form of official censorship is the growing practice of denying entry visas to progressive figures from other countries. In doing so reference is made to the McCarran-Walter Act, which during the McCarthy era was used to combat Communist ideas. Entry visas are denied to people who are famous for their progressive views and plan while in the country to make public appearances and meet with Americans active in the peace and civil rights movements. The usual reason given for the refusal to issue an entry visa is that the presence of that person in the country would not be in the national interests of the United States.

Censorship is also exercised when attempts are made to stop the export of American films critical of government policies. The following method is used for this. Under the 1949 Beirut Agreement, documentary films that further the development of education, culture, science and tech-

nology can be imported into a country party to the treaty duty free. The importation of films not fitting this description may be done only upon paying large duties, which often makes it financially unrewarding to do so. The decision on how the film is to be classified is made by the country where the film was made, and the film is issued a corresponding certification.

In recent years U.S. government agencies led by the U.S. Information Agency have refused to certify a number of films made in the United States as "educational," although several of these films won prizes at home.

Unable to directly ban the distribution of these films abroad, the government does so indirectly, by refusing to certify them, which makes them difficult to export. Meanwhile the U.S.I.A. has not hesitated to certify films that express government viewpoints.

In a fit of ideological zeal, Charles Wick, the director of the U.S.I.A., compiled a list of people whom he has barred from official programs for broadcast abroad. This list included Senator Gary Hart, Rep. Thomas Downey, economist and author John Kenneth Galbraith, the poet Allen Ginsberg and consumer advocate Ralph Nader.

The Reagan Administration restricts the free distribution of information and free access to it in pursuit of its own selfish political interests.

An analysis of the scope and content of citizens' rights and freedoms at various levels, i.e., in the context of the ideals of constitutionalism and constitutional guarantees, in Supreme Court rulings interpreting these ideals and guarantees, and as they are exercised in practice, indicates that there are clearly visible gaps between these levels. If the middle level (judicial interpretations) is removed, and the political practice is placed in comparison with the abstract ideals and principles, then this gap is even more apparent. Such core concepts of American constitutionalism as political liberty, freedom of expression, "liberty and justice for all," "due process of law," "equal protection of the laws" and "government of law, not of men" are far from being realized. Unquestionably, in the two hundred years since the Constitution was adopted, the American people have gone a long way toward realizing their constitutionally protected rights and liberties. Yet, the blessing of freedom bequeathed to future generations by the Founding Fathers in the Preamble to the Constitution remains but an unfulfilled promise.